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Editor KRISHNA SAHAI *Advocate*

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IFTIKHAR HUSAIN
GOPINATH
H P SEN
G P SINGH
} Advocates, High Court.

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JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1959

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Agreement to lease—*In contemplation of expiry of existing term—Sitting tenants wrongful refusal to vacate—Agreement whether suffers from a common mistake of fact—Commencement of lease—Not expressly stated but ascertainable otherwise—Agreement, whether void for uncertainty—Indian Contract Act 1872 ss 20 and 29*

An agreement for lease on the assumption or belief of both the parties that the sitting tenants would vacate the premises after the expiry of their term cannot in case of their wrongful refusal to vacate be said to be based on a common mistake of fact so as to be rendered void by s 20 of the Contract Act

A lease for a term of the commencement of which is not expressly stated but is nonetheless ascertainable from the recitals in the deed or other circumstances cannot be said to suffer from uncertainty so as to be void under s 29 of the Contract Act

(B) Agreement to lease—*Whether and when compulsorily registerable—Effect of non registration—Indian Registration Act 1908 ss 2(7) 17(1) (d) and 49*

S 17(1) (d) read with s 2(7) of the Registration Act makes a lease as well an agreement to a lease of immovable property from year to year or for a term exceeding one year compulsorily registerable The expression agreement to lease however covers only such agreements as create a present demise

Where a document fixes all the essential terms of a lease and would be effective without the necessity or assistance of any other or further agreement or document to be executed in future it creates a present demise notwithstanding the fact that it is to take effect or possession obtainable at a future date Such a document if unregistered is neither valid or admissible in evidence

U P Government v Nanhoomal 581

Agricultural Income-tax—*Company claiming deductions as staff salary—Accounts filed—Deductions allowed by the assessing officer—Revision to the Board—Reduction of the staff salary—Board jurisdiction of—U P Agricultural Income Tax Act 1948 s 13(3) and Indian Income Tax Act 1922 s 23(3) scope of*

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The company in compliance with a notice under s 15(3) of the United Provinces Agricultural Income Tax Act furnished accounts on 12th September 1950 claiming deductions to the extent of Rs 26 630 12 These deductions were allowed by the assessing officer but on revision to the Board by the State the Board reduced the amount of the staff of the salary to Rs 7 488 15 although the assessing officer allowed a deduction of Rs 11 488 15 on account of the staff salary Against this order of the Board this reference has been filed under s 64 of the U P Agricultural Income Tax Act

Held, that there being no material or evidence before the Board it had no power or jurisdiction to disallow any part of the deductions claimed as staff salary by the company

The Lakshmi Sugar & Oil Mills Ltd *v* State 626

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Allotment of the House—*Requisition for public purpose—Allottee—Notice—Occupation, scope of United Provinces (Temporary) Accommodation Requisition Act 1947 s 3 applicability of*

The District Magistrate Lucknow on April 12 1958 requisitioned the house no 97 situate at Lukhmenganj Lucknow under s 3 of the U P (Temporary) Accommodation Requisition Act 1947 This house was allotted to and was occupied by Sri B L Srivastava who shifted to a house he built for himself M S Srivastava the petitioner was living with B L Srivastava as a guest or at a relation he applied for allotment but on April 12 1958 a notice was served by the District Magistrate on B L Srivastava that the house was requisitioned and B L Srivastava was directed to hand over possession to the Rent Control and Eviction Officer Lucknow B L Srivastava contended that he was an occupier and he should be served with the notice

Held (i) that the person who was living as a guest of the allottee cannot be considered to be an occupier of the premises and the occupation of the applicant was only with leave and licence of the allottee

(ii) that the petitioner had no *locus standi* to challenge the validity of the District Magistrate's order as he was not an occupier

Mahendra Shanker Srivastava *v* K C Mittal District Magistrate Lucknow 589

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Arbitration—*Application for reference to—Period of limitation for—Cause of action when accrues—Arbitration Act 1940 s 20—Indian Limitation Act, 1908 Art 181*

Where under the terms of a lease containing an arbitration clause the lessor has unquestionably the right to terminate the lease and enter into possession subject only to the right of the lessor to recover compensation the cause of action for the purposes of limitation to an application for reference to arbitration accrues not when the lease is terminated but when the parties come to an issue regarding the right to or amount of compensation 1

Quaere whether an application under s 20 of the Arbitration Act for reference of a dispute is governed by Art 181 of the Limitation Act

The view in the affirmative taken in *L Amar Nath v The Union of India* (Desai and Beg JJ) it was observed needs reconsideration by a larger Bench

Sarwaiyar Khan *v* State of Uttar Pradesh 239

Arbitration—*Award—Arbitrator in the alternative—Arbitration Act 1940 s 39 scope of—Arbitration Act, 1940 s 3—Date of entering on reference, scope of*

On 23rd September 1948 Hasan Ali Khan and Asghari Begum entered into an agreement by which they appointed Sajjad Ali Khan as an arbitrator to decide on the dispute between them regarding some movable property left by their mother The deed of agreement also provided that in case Sajjad Ali Khan refused to act as an arbitrator Maulana Ibne Hasan should act as an arbitrator On 19th October 1948 Sajjad Ali Khan entered on reference He took certain proceedings in January 1949 but later on he refused to act as an arbitrator On 19th January 1949 Maulana Ibne Hasan entered on reference and declared his award on 18th May 1949 On 2nd June 1949 an application for filing the award was filed On

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23rd August 1935 objections to the award were filed On 2nd March 1936 the trial court rejected the application for the filing of the award holding that award was given beyond time An appeal was filed under s 39 of the Arbitration Act

Held (i) that the order of the trial court amounts to an order setting aside the award and is appealable

(ii) also that the date of entering on the reference i e 19th January 1949 should be the date on which the arbitrator who was to act in the alternative entered on the reference and hence the award given on 18th May 1949 is within time

Nawab Syed Hasan Ali Khan *v* Nawab Askari Begam *alias* Nawab Asa Begam 328

Arbitration Agreement—*Suit in respect of matter covered by—Application for stay of—Unauthorized application for adjournment and application for setting aside ex parte order, whether steps in suit—Arbitration Act 1940 s 34*

Neither an application for adjournment filed by a Pleader without authority and dismissed as such nor an application praying for and securing the setting aside of an order for proceeding with the suit *ex parte* can be said to be a step in the proceeding so as to deprive the applicant of the benefit of s 34 of the Arbitration Act for the stay of the suit relating to a matter agreed upon by the parties to be decided through arbitration

The Bharat Vegetable Products Ltd *v* Ram Dai 555

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Board of Revenue—Ex parte *order by a Judicial Member rejecting application for revision—Judicial Member appointed and took over as Administrative Member—Competence of the successor to set aside the ex parte order and admit revision without notice to opposite parties—U P Zamindari Abolition and Land Reforms Act 1951 ss 20 22a and r 239—United Provinces Land Revenue Act, 1901 rr 7, 219 and 220—Land Records Manual, rr 182 and 190—United Provinces Tenancy Act 1939 s 273—Code of Civil Procedure 1908 s 151 O XLVII rr 1 4 and 5—Constitution of India 1950 Art 226*

An application to the Board of Revenue for the revision of an order under the Zamindari Abolition and Land Reforms Act was dismissed *ex parte* by the Judicial Member concerned The Judicial Member was later appointed and took over as the Administrative Member Board of Revenue His successor on a motion to that effect set aside the *ex parte* order and admitted the revision without notice to the opposite parties

On a petition for a writ in the nature of *certiorari* to quash the latter order

Held (i) that the Board of Revenue is a court only in so far as disposal of judicial work is concerned A Judicial Member therefore who is transferred to and put in charge of the work on the administrative side of the Board of Revenue cannot be deemed to continue or continue attached to the court for the purposes of O XLVII r 5 of the Code of Civil Procedure so as to enable or require him alone to review his orders passed while acting as a Judicial Member

(ii) that s 220 (3) of the United Provinces Land Revenue Act to the effect that a single Member of the Board of Revenue shall not have power to alter or reverse a decree or order passed by Board or any other Member than himself does not extend or apply to proceedings under the Zamindari Abolition and Land Reforms Act

(iii) that neither the United Provinces Tenancy Act nor the rules framed thereunder including r 190 of the Revenue Manual apply to revisions under the Zamindari Abolition and Land Reforms Act

(iv) that it is competent for one or more of the Judicial Members who constitute the Board for that purpose to review or alter an order passed by the predecessor or predecessors as the case may be

(v) that O XLVII r 4 of the Code of Civil Procedure has no application to a case of this kind and it is open to a court to review and set aside an *ex parte* order of dismissal without notice to the opposite parties

(vi) that proceedings by way of *certiorari* are not of course and the mere fact that an order was without jurisdiction or that

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there was an error apparent on the face of the record was not sufficient to justify the issue of the writ it must in addition be established that the impugned order had resulted in injustice to the petitioner

There being no such consideration and the petitioner having had and not availed of the alternative remedy of moving the Board itself for appropriate relief the petition must fail even on that ground

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Citizenship of India—*Acquisition under the Constitution—Acquisition by Registration under the Citizenship Act—Requisites on—Constitution of India Arts 5 and 7—Citizenship Act, 1955 ss 2(1) (b) 2(1) (c) 5(1) (a) 5(1) (e) and 5(3)*

AK who had his domicile of origin in India where he and both of his parents had been born and living ever since opted finally for Government service in and migrated to Pakistan after the first day of March 1947 He served Pakistan Government for six months and then resigned and came back to India in February 1948 On the 31st August 1956 he obtained a certificate of registration as an Indian citizen from the Collector of Rampur and was elected to the U P Legislative Assembly in 1957 His election being challenged *inter alia*, on the ground that he was not a citizen of India

Held (i) that notwithstanding the fact that he fulfilled all the essentials for Indian citizenship under Art 5 of the Constitution his case fell within Art 7 so that he never acquired Indian citizenship under the Constitution

(ii) that for the purposes of acquisition of Indian citizenship by registration under the Citizenship Act his case was covered

(a) not by s 5(3) since he could not be said to have ever renounced or been deprived of Indian citizenship

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(y) nor by s 5(1) (e) since he could not in the absence of the requisite notification by the Central Government under s 2(1) (c) be deemed to be a citizen of Pakistan

(z) but by s 5(1) (a) as a person of Indian origin ordinarily resident of India and being so resident for six months immediately before making the application for registration

(iii) that it was under the circumstances not necessary for him to obtain registration from the Central Government and that the registration by the Collector being good and sufficient he became the citizen of India on the 31st of August 1956 and was therefore duly qualified for the membership of the Legislature

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Contracts by the Union or a State—*How to be executed and expressed—Non compliance with requisite forms, effect of—Government of India Act 1935 [36 Geo 5 Ch (2) s 175(3)—Constitution of India 1950 Art 299 (1)]*

The constitutional requirement is that all contracts by the Union or a State shall be expressed to be made by the President or the Governor as the case may be A contract which does not conform to the prescribed mode though not void is unenforceable against the Government unless it chooses to ratify and be bound by it

U P Government *v* Nanhoomal Gupta 561

Co-operative Societies in Uttar Pradesh—*Post of Auditors in higher scale of pay sanctioned for—Division of Auditors into two sections—Auditors in one section given the higher scale as a matter of course while those in the other subject to a qualifying test—Validity of—Constitution of India, Arts 14 16 226 310 311*

On the recommendation of the Pay Committee the State of Uttar Pradesh sanctioned a higher scale of pay for the Auditors in the Co operative Department The department was there after split up into two sections—the Cane Co operative Societies Auditing Section and the Co operative Societies Auditing Section (General)—and while those in the former were given the higher scale as a matter of course those in the latter were to receive it subject to a qualifying test prescribed by the department

In a petition under Art 226 of the Constitution praying for an order directing the State of Uttar Pradesh to give the petitioners in the General Section the higher scale of pay unconditionally

Held overruling the preliminary objection that there is as between the constitutional guarantee under Art 14 and the power conferred by Art 310 no inconsistency of the kind contemplated by the maxim *generalia specialibus non derogant* The exercise of all the powers—legislative executive or judicial—derived from the Constitution and a *fortiori* that under Art 310 are subject to and must be controlled by the provisions of Part III of the Constitution The protection of Art 14 is therefore available to a Government servant against any action which amounts to a purposeful discrimination as distinguished from a *bona fide* exercise of power under Art 310

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Held (i) further that the guarantee of equal opportunity under Art 16 (1) of the Constitution in matters relating to employment or appointment to any office under the State is confined to the stage of initial employment and has no application to matters after entry in service such as promotion selection for higher posts increase or reduction of salary retrenchment or termination of service

(ii) that the Government's decision to impose a qualifying test on General Auditors was correct and the error if any could lies in exempting the Cane Auditors from a similar test The qualification or requisite standard of the staff of any department must however be left to the sole discretion of the Government and the High Court has no jurisdiction to interfere with the decision of the executive in that sphere Moreover a citizen may invoke Art 226 for the protection of his own right but not to prevent any other citizen from obtaining something to which he was not alleged entitled (case of *quo warrante* and habeas corpus are exception)

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While labour disputes between the Upper Ganges Valley Electricity Supply Co Ltd Moradabad and its employees were pending *inter alia* before the Regional Conciliation Officer Kanpur and the Labour Appellate Tribunal D G A Resident Engineer of the Company dismissed G S S Mains Foreman on the strength of permission secured *bona fide* on 8th March 1956 from the Labour Appellate Tribunal alone under s 22 Industrial Disputes (Appellate Tribunal) Act 1950 Thereupon District Magistrate Moradabad instituted complaint against D G A under s 14 U P Industrial Disputes Act 1947 read with Government notification no 4464 (LL)/XXXVI B—257 (LL) 1954 dated 14th July 1954 for the above dismissal without permission from the Regional Conciliation Officer of the area concerned

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Upon application by the accused under ss 526 561 A Criminal Procedure Code

Held (i) that there was no allegation of bad faith and there could be no presumption of bad faith against the accused

(ii) that he had acted in good faith as defined in s 4(17) U P General Clauses Act

(iii) that his illegal omission amounted to act done under s 4(a) U P General Clauses Act

(iv) that he was protected by s 22 U P Industrial Disputes Act

The criminal proceedings were therefore quashed

D G Athalye v State 421

Criminal Proceedings—*Inherent power of High Court to interfere in—When exercised—Reasonal power of High Court—Exercise of, in pending cases—Code of Criminal Procedure, 1898 ss 439 and 561 A*

Of the several complaints filed against different branches of the U P Electricity Supply Company some were against the company alone some against the company through their Resident Engineer who it was prayed should be tried for the offence committed by the company and others against the company as also certain other persons such as the Governing Director Chief Engineer or Resident Engineer in their personal capacity The respective Magistrates took cognizance of these cases and the proceedings reached the stage in all cases of the issue of summonses for the appearance of the accused in some appearance had been entered while in others prosecution evidence had been recorded

In an application to the High Court under s 561 A of the Code of Criminal Procedure for the appropriate relief against the above proceedings on the ground (a) that the alleged breach of the provisions of the Indian Electricity Act or the Rules made thereunder did not constitute a crime and could at best involve a civil liability or the cancellation of the licence issued to the company (b) that on the face of the complaint itself there was no justification for the trial of or the issue of the process against the individuals

Held (i) that the inherent power of the High Court preserved under s 561 A of the Code could not be invoked whereas in this case an appropriate relief was available under the express provisions of the Code

(ii) as to (a) that this objection could well be taken before and must in the initial stage be left for the decision of the Magistrate himself and the applicants could ultimately come to the High Court through a reference or revision against that order and as

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to (b) that the proceedings against the individuals were illegal and must be quashed and the Magistrate in other cases must be directed not to issue any process in the name of Resident Engineer in their personal or even representative capacity

(iii) further that the aforesaid relief could however be granted by the High Court not under s 561 A but under s 439 either by treating the application as such or acting *suo moto* on information so received

The Agra Electric Supply Co *v* State 528

Criminal Trial—*Criminal Prisoner—Hunger strike—Prisons Act 1894 ss 5(2) and 52 and Jail Manual, Chapter xxxvii para 742 and Chapter XXX para 806 scope of*

Held (i) that the act of going on hunger strike is an offence under para 742 of the Jail Manual and is punishable under S 52 of the Prisons Act provided the accused was a prisoner under s 5(2) of the Prisons Act

Where the accused repeatedly refused to take food to seek a redress for his supposed grievances it must be held that the accused was on hunger strike and his case falls under para 742 of the Jail Manual

(ii) Para 742 of the Jail Manual does not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to jail Hunger strike has been made no offence by the State and the act of hunger strike *per se* does not constitute an offence

Where the accused was committed to jail on the basis of an order issued by a proper authority and not because he went on hunger strike but while in jail he was on hunger strike then his case falls under s 52 of the Prisons Act for he committed a breach of the rules framed for maintaining discipline in Jails

(iii) Also that every fresh act of refusal to take food at the time when meals are given to prisoners in Jail would constitute a fresh offence

Lakshmi Narain *v* State 1

Criminal Trial—Murder—Husband killing the accused—Intimacy with the wife—Grave and sudden provocation—Onus—Discharge—Indian Evidence Act 1872 s 105—Scope of—Indian Penal Code 1860 ss 300 Explanation 1 302 and 304 scope of

It is proved that Ram Nath deceased was killed by the accused appellant at the hut in the Government House orchard at 4 30 p m on 11th January 1958 and it is contended that the appellant committed this crime when he had completely lost his

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self control and his case falls under s 304 Indian Penal Code and not s 300

The prosecution alleged that the deceased had come to the wife of the appellant in his absence even though the deceased had suspected on earlier occasions that he carried on an illicit intimacy with his wife and had gone even to the extent of drawing the attention of the community Panchayat to this fact The appellant was also uttering words that he was causing injuries to the deceased because in his opinion the victim was having an intrigue with his wife

Held (i) that where it becomes apparent from the evidence led in the case whether produced by the prosecution or the defence that an exception would be applicable the presumption against the accused is removed and the onus placed upon him is discharged and court must consider whether the case of the accused is covered by the exception or not irrespective of the stand taken or the plea advanced by him Where on consideration of the entire evidence the court is left in doubt the benefit of the exception cannot be denied to the accused ,

(ii) that where the prosecution case itself indicates than an exception is applicable in favour of the accused the accused cannot be denied the benefit of that exception whether he pleads it or not

Where the husband is living in a fool s paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and this intimacy was continued all the time this would amount to a sudden knowledge which would come as a shock to him and the circumstances established in this case proved that the accused when he killed the deceased had lost his self control because of a grave and sudden provocation and his conduct is protected by Exception 1 to s 300 Indian Penal Code and his offence falls under s 304 Indian Penal Code and he can be convicted only under this section

Babu Lal *v* State 255

———*Production of documents in—Order for, against the accused—Validity of—Code of Criminal Procedure, 1898 s 94—Constitution of India 1950 Art 20(3)*

An order passed under s 94 of the Code of Criminal Procedure calling upon the accused to produce a document in his possession and likely to be used against him attracts the prohibition laid down under Art 20(3) of the Constitution—testimonial compulsion—and is therefore bad and liable to be set aside

R C Gupta *v* State 152

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——*Prosecution under s 19 (f) of the Indian Arms Act 1878—Sanction validity of—Indian Evidence Act, 1872 ss 56 and 57(7) scope of*

In a case under s 19 (f) of the Arms Act it was proved that an unlicenced pistol with some cartridges was found on the person of Dhanpat the appellant when he was arrested When the investigating agency framed the charge sheet in this case it forwarded it to the District Magistrate Bara Banki to obtain his sanction and there was an endorsement on this charge sheet which was as follows

Prosecution sanctioned and then there were some initials underneath this endorsement This charge sheet was exhibited in the court of the Committing Magistrate but somehow it was not exhibited before the trial court

The accused appealed

Held (i) that the procurement of sanction under the second part of s 19 is necessary for a prosecution under s 19 (f) Arms Act in the districts of Avadh

(ii) that the police cannot be held to be empowered to launch such a prosecution without the control exercised by the District authorities

(iii) that the police charge sheet being a public document can be proved by its presentation in original and no other proof is needed As the endorsement of the District Magistrate is on this very document judicial notice of it can be taken under the provisions of ss 56 and 57 (7) of the Indian Evidence Act and there is thus a valid sanction on the record

Dhanpat *v* State 185

Cross-objection—*Appeal dismissed for non payment of court fees—C P C 1908 Order XLI rule 22 sub rule 4 scope of—Dismissal for default, meaning of*

Held that Order XLI rule 22 sub rule 4 provides for those cases only where an appeal is withdrawn or dismissed for default Rejection of an appeal for non payment of court fee is not a dismissal for default of the appeal and consequently a cross objection cannot be heard and determined after the dismissal of such an appeal

C P Mehra *v* Smrati K K Mehra 9

Dacoity with murder—*Punishment for—General rule—Indian Penal Code 1860 s 396*

As a general rule the sentence of death should necessarily follow a conviction under s 396 Indian Penal Code unless a case is made out for awarding a lesser sentence and there is in that respect no distinction between this section and s 302 of the Code

Khanadev Singh *v* State 591

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Defence of insanity—When available to an accused person in a criminal trial 216

Delegation of authority—By the State Government under s 11 A U P Industrial Disputes Act 1947 is confined to reference alone of an industrial dispute to a Labour Court or Tribunal only after the State Government has itself decided under s 4 K that such an industrial dispute exists or is apprehended 141

Derived—In s 2(1) a) U P Agricultural Income Tax Act 1949 connotes net amount actually received or realized by the assessee and not what he should have got or realized 353

"Dismissed for default"—in Order XLI Rule 22(4) Civil Procedure Code 1908 —Meaning of 9

District Magistrate—Power of to secure or suggest variation in an order passed by the Rent Control and Eviction Officer under the U P (Temporary) Control of Rent and Eviction Act 1947 403

District Magistrate's power of delegation under the Rent Control and Eviction Act—Authorization General or special 640

Donation to an institution or fund—Scope and significance prescribed by rule 17 U P Agricultural Income Tax Act 1949 353

Ejectment—Suit for of a tenant from the premises let out—If maintainable where the notice under s 106 Transfer of Property Act 1882 for the purpose preceded permission granted by the Rent Control and Eviction Officer under s 9 U P Rent Control and Eviction Act 1947 284

Election Petition—*Proceedings in whether of a civil nature for purposes of appeal to Supreme Court—Constitution of India* 1950 *Art* 133—*Code of Civil Procedure* 1908 *ss* 9 109 *and* 110—*Representation of the People Act* 1951 *ss* 116 *A and* 116 *B Vakalatnama—Stage up to which continues to remain in force—Necessity for filing afresh in a petition for leave to appeal to Supreme Court—Rules of Court* 1952 *Ch I r* 5—*Code of Civil Procedure,* 1908 *O III r* 4

Appeal to Supreme Court—Certificate from High Court for—when the case is a fit one for appeal to the Supreme Court —Constitution of India 1950 *Art* 133(1) (c)

The right to vote for or be elected to a seat in the legislative or Municipal bodies is a civil right and the litigation for enforcing or securing the same is a civil proceeding within the meaning of Art 133 of the Constitution A petition for leave to appeal to the Supreme Court from the judgment of the High Court under the Representation of the People Act 1951 is accordingly maintainable under he said Article

Keshav Gupta *v* Ghayur Ali Khan 457

Election Tribunal—If competent in view of the provisions of Rule 5(2) U P Panchayat Raj Rules to go behind the

relevant entry impugned in the family or adult register of the Gaon Sabha and decide on the evidence adduced the real age of the person elected as Pradhan 309

Election Tribunal and the Returning Officer—Under the U P Municipalities Act 1947 and the U P Municipalities (Conduct of Election of Members) Order 1955—Jurisdiction of—Co extensive 229

Endorsement of the District Magistrate—On the charge sheet under s 19(f) Indian Arms Act 1878—Whether judicial notice under ss 56 57(7) Indian Evidence Act 1872 could be taken in proof of valid sanction 185

Evidence in preliminary inquiry—*Power of Presiding Judge to treat it as evidence in the case—When and how to be exercised—Code of Criminal Procedure, 1898 ss 288 and 540*

The power of the Sessions Judge to treat the evidence before the Committing Magistrate as evidence in the case before him must be exercised judicially on sufficient grounds and through a specific decision to that effect

Where the prosecution witnesses are alleged to have been won over and resiled from their evidence at the preliminary inquiry it is the duty of the Judge to test by cross examination or other evidence under s 540 of the Code of Criminal Procedure and satisfy himself of the truth of the allegations made The mere fact that the Sessions Judge chose to treat it as such will not render the evidence admissible through s 288 of the Code and the conviction based on such an evidence must be set aside

Dev Lal v State 156

Enrolment of Advocates—*Power of High Court in matters of—Provisions under the Letters Patent—Subject to those under Bar Councils Act and the rules thereunder—Letters Patent (Allahabad) 1866 cls (7) and (8)—United Provinces High Courts (Amalgamation) Order 1948 cl 8—Indian Bar Councils Act 1926 s 9(1) 19(2)—Allahabad Bar Council Rules r 1 Judicial Office —Meaning of, for purposes of enrolment as an Advocate*

The power of the High Court regarding the enrolment of Advocates under clauses 7 and 8 of the Letters Patent preserved through cl 8 of the Amalgamation Order must now be read in conjunction with and as subservient to the provisions of the Bar Councils Act and the rules framed thereunder and the position now is that while the High Court retains unfettered power to refuse in its discretion admission to any person to the roll of Advocates it can no longer admit as an Advocate a person who is not qualified under the Act and the rules aforesaid

The enrolment of a person as an Advocate on the ground of his having held Judicial Office is confined exclusively to

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members of a judicial service and is not available to persons of any other service even though it may involve performance of duties of a judicial nature

T P Bhalla in the matter of enrolment 537

Express contract—Of indemnity for breach of warranty of title—Effect of on rights under the statutory covenant secured by s 55(2) Transfer of Property Act 1882 521

False information to a public officer—*Prosecution for—Authority competent to file the complaint—Objection to prosecution when to be taken—Indian Penal Code 1860 s 182—Code of Criminal Procedure 1898 ss 195 and 537*

Where a false complaint made to a public officer is referred to and enquired into by a subordinate officer the latter is a competent authority within the requirement of s 195 of the Code of Criminal Procedure to initiate the prosecution for the offence under s 182 of the Penal Code

Moreover the objection to the validity of a prosecution for want of the requisite complaint must be raised at the earliest possible opportunity so that the material facts may be brought on record and on failure to do so the order or sentence may well come within the saving enacted by s 537 of the Code of Criminal Procedure

Sheo Prasad *v* State 127

Family or adult register of the Gaon Sabha—Prepared under s 9 U P Panchayat Raj Act 1947—Entry as to age of a member is final and conclusive and not liable to be reopened in an election petition 309

Finding—*inter alia* on *locus standi* of plaintiff in earlier suit—If operates as *res judicata* in subsequent suit under s 11 Code of Civil Procedure 1908 347

Fiscal Act—Principles governing interpretation of 353

Food Adulteration—*Food Inspector and Public Analyst under the previous Act—General Clauses Act 1897 s 6(b) scope of—Prevention of Food Adulteration Act 1954 ss 7 and 16 applicability of—Administrator of Municipal Board, powers of*

Shyam Behari is the owner of a milk shop and Ram Lal his servant at the said shop A food inspector purchased half a seer of milk from Ram Lal and he put his milk in three bottles which were corked sealed and labelled in the presence of witnesses Shyam Behari was upstairs at the time of the sale of milk but he came down later on and a notice was also given to him Two sealed sample bottles were sent to the office of the Medical Officer of Health The Medical Officer of Health sent one sample bottle to the Public Analyst who sent his report showing that the milk contained 19 per cent of added water and was adulterated The Medical Officer of Health on behalf of the Municipal Board Lucknow submitted a complaint against Shyam Behari and Ram

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Lal Ram Lal could not be traced Prosecution started against Shyam Behari

Held also that there was an order by the Administrator which empowers the Medical Officer of Health of the Municipal Board to launch prosecutions of this nature and hence the complaint was good in law

Municipal Board Lucknow v Shyam Behari 121

General Manager—Whether employer for purposes of a claim by the railway servant under Workmen's Compensation Act 609

Guarantee of equal opportunity—Under Art 16(1) of the Constitution in matters relating to employment or appointment to any office under the State—confined to stage of initial appointment 11

Guest of the allottee cannot be considered to be an occupier of the premises—As such had no *locus standi* to challenge the validity of the requisition order 189

High Court—Power of—If derogated from the promulgation of the U P Universities Ordinance no 1 of 1959 by the Governor 267

High Court—Power of—for enrolment of Advocates—Subject to the provisions of the Indian Bar Councils Act 1926 and the Rules framed thereunder 537

Hire purchase agreement or sale transaction—Distinction between —Test of hire purchase agreement —The alleged hirer must enjoy real option to terminate it any time at will 308

Held that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food but also the person on whose behalf the adulterated food is sold and Shyam Behari is liable to be punished under ss 7 and 16 of the Prevention of Food Adulteration Act

Held that until fresh appointments are made appointments duly made under the previous Act must be considered to be valid and good and the Food Inspector and the Public Analyst must be taken to be persons competent to act as such when the offence took place

History sheet—*Confirmed or professional criminal—U P Police Regulation 228 scope of—Administrative action jurisdiction of the Court—Constitution of India Art 226 scope of*

Held (i) that the jurisdiction to start a history sheet under Regulation 228 arises from the fact that the particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material

If in any particular case there is complete absence of any such material the action in starting a history sheet will not only be illegal but also without jurisdiction

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(ii) further that although the opening of a history sheet is purely an administrative action and ordinarily the High Court will not interfere in administrative actions but where the action taken is on the face of it arbitrary or capricious and is without jurisdiction the powers of the High Court under Article 226 are not wanting

Mohammad Yasin v Superintendent of Police Sitapur 115

Hospitals—Subject to general inspection by the Civil Surgeon—If can be treated as in receipt of a grant from the Government within the meaning of the notification issued under r 17 framed under the U P Agricultural Income Tax Act 1949 333

Hunger strike—When it constitutes an offence under para 742 of the Jail Manual punishable under s 52 Prisons Act 1894

Income escaping assessment—*Time within which power to assess or re assess exercisable—Saving of action taken or assessment made in consequence of or to give effec to order of superior courts in appeal or on reference—Scope of—Income Tax Act, 1922 ss 23(3) 31 34(1)(a) and 34(3)—certiorari and Prohibition—Plea of alternative remedy in—Constitution of India, 1950 Art 226*

On 7th March 1952 the Income tax Officer issued a notice under s 34 1)(a) of the Income Tax Act—Taxation of income escaping assessment by reason of an omission or failure on the part of the assessee within eight years of the end of the year of assessment—on the assessee in respect of his income for the assessment year 1947 48 and re assessed him accordingly The Appellate Assistant Commissioner allowed the appeal against this re assessment on the ground that the income in question accrued in the financial year 1945 46 so that the same could not be said to have escaped taxation or be taxed in the assessment year 1947 48

The Income tax Officer accordingly revised his order for the assessment year 1947 48 but went on to issue on 4th January 1956 a fresh notice under s 34(1)(a) for re assessment of the income for the assessment year 1946 47 The objection that the notice was barred by time that further proceedings based on the same would be illegal and without jurisdiction being overruled and the assessee coming to the High Court through a petition under Art 226 of the Constitution for the appropriate relief

Held (i) that the notice in question in order to be in time had to be served on or before 31st March 1955 and was therefore time barred

(ii) that the said notice could not be deemed to be in consequence of or to give effect to any finding or direction contained in the order of the appellate authority and the benefit of the second proviso to sub s (2) of s 34—saving from the time limit

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any action taken or assessment so made could not accordingly be invoked in this case

(iii) that in order to attract the application of the proviso aforesaid it is necessary—

(a) that the finding or direction contained in the appellate order must be material and necessary for the disposal of the appeal and must essentially be confined to or affect only such persons who are parties to the proceedings or those who are intimately connected with or interested in the proceedings and are practically represented by the actual parties

(b) that the notice issued must automatically and directly follow from the said finding or direction without any consideration or interposition of additional facts or circumstances *S C Prashar v Pasunlen Dwarkadas* (1) holding that the second proviso to s 34(3) offended Art 14 of the Constitution in so far as it affected strangers to the proceedings amplified

(iv) further that the plea of alternative remedy is not available in a case for prohibition and that even in a case for *certiorari* it should not prevail where the alternative remedy involves unnecessary hardship and harassment to the petitioner such as the expenses and all inconveniences of further proceedings including payment of the imposed tax under a taxing law

Harari Lal v Income tax Officer Kanpur 152

Income escaping assessment during war period—Provision for assessment or re assessment—Constitutionability of—Indian Income Tax Act 1922 s 34(1 A)—Constitution of India 1950 Art 14 451

Income-tax Officer—Exercise of power of assessment by—Whether biased and transgressing principles of natural justice—Validity *of proceedings* 451

Indian Penal Code, 1860 s 100 cl (v)—*Right of private defence of body—Assault with the intention of abducting—Interpretation of Statutes—Abducting meaning of*

By s 100 Indian Penal Code the right of private defence of body extends to the voluntary causing of death where an assault is made with the intent of abducting

Where an assault was made on the appellant s sister by her husband who compelled her by force to go away from her father s house and the appellant inflicted one injury with knife on the assailant which however killed him the High Court convicted the appellant under s 304 Part II Indian Penal Code holding that the right of private defence of body under s 100 cl (v) Indian Penal Code was not available to the appellant as the word abducting used there referred to such abducting as is an offence under the Code and not the mere fact of abduction as is defined under s 361 thereof

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On an appeal to the Supreme Court *held*, that on a plain reading of s 100 cl (v) Indian Penal Code the word abducting used there means the mere act of abduction as defined under s 362 of the Code and does not refer to such abduction as is an offence under s 363 onwards of the Code An assault having been made on the appellant s sister with the intention of abducting her the appellant was entitled to the right of private defence of body under s 100 cl (v) Indian Penal Code

Held further that the appellant did not inflict more harm than was necessary

The appeal accordingly was allowed and the appellant acquitted

Vishwanath v State 633

Indian Penal Code, 1860 ss 149 302—*Forcible possession—Murder—Common object of the unlawful assembly—Test—Weapon and conduct material—Section two parts—Distinction between*

By s 149 Indian Penal Code If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence Where the appellants went in a body armed with lethal weapons with the common object of taking forcible possession of land which was in possession of others at any cost and one of the appellants fired a pistol at the instance of another member of the unlawful assembly and killed the person in possession

Held (i) that the offence of murder must be held to be immediately connected with or in direct prosecution of the common object of taking forcible possession by the unlawful assembly

(ii) further that the members at any rate must be held to know that the murder was likely to be committed to accomplish the common object

Consequently the case fell under s 149 Indian Penal Code and all the appellants were guilty of murder

Held further that s 149 Indian Penal Code is in two parts The first part of the section applies where the offence committed is not in direct prosecution of the common object i e is in direct prosecution of the common object of the assembly

Mizaji v State of Uttar Pradesh 19

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Industrial Disputes—*Adjudication of—Delegation of power by State Government to Labour Commissioner and Deputy Labour Commissioner—Scope and validity of—United Provinces Industrial Disputes Act (XXVIII of 1947) ss 4 A and 11 A—Notification dated 20th May 1957—Constitution of India 1950 Art 226*

Section 4 A of the United Provinces Industrial Disputes Act casts on the State Government the duty to judge whether an industrial dispute exists or is apprehended and invests it with the power to refer the same for decision to a Labour Court or Tribunal as the case may be and the delegation authorized by s 11 A is confined to the latter and does not extend to the former which must be discharged by the State Government alone

Accordingly where the Deputy Labour Commissioner purporting to act through the delegation made under s 11 A formed his own opinion regarding the existence of an industrial dispute and refers the same for decision to the Industrial Tribunal the reference so made is not competent and must be quashed

Messrs Parshottam Das Chunna Lal v Brij Mohan Lal 191

Insanity—*Test of for exemption from criminal responsibility—Indian Penal Code, 1860 s 84*

The defence of insanity is not available to an accused who is shown to have had a motive for the crime whose conduct not only at the time of but even before and subsequent to the occurrence clearly shows that he appreciated the nature and consequence of his act and who took rational steps to achieve his object and escape detection and punishment

The test of insanity in law does not coincide with that in medical science and s 84 of the Penal Code covers merely those cases where a person not only did not in fact know but was incapable of knowing the nature wrongfulness or illegality of his act The exemption does not extend to a person who is potentially capable of such understanding or judgment but is precluded from or errs in exercising the same

Lakshmi v State 216

Interpretation of Will—Extraneous evidence or circumstances when should be taken into consideration—Test primarily is sole guide 297

Irrigation productive or protective work constructed for the benefit of the land"—In s 5(d) and s 6(c) U P Agricultural Income Tax Act 1949—Explained

Interpretation of statute—Principles to be followed 355

Joint or separate rent application—Determining conditions 451

Judicial office—In Rule 1 of the Rules made by the Allahabad Bar Council under s 9 Indian Bar Councils Act 1926—Meaning of for purposes of enrolment as an Advocate 21

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Jurisdiction of the Board—to disallow—deductions claimed by the company—under Agricultural Income Tax Act—without any material or evidence before it 626

Jurisdiction of court—To set aside without notice to and hearing the other party an *ex parte* order made against one party when both parties were absent the time the said order was made 185

Jurisdiction—Of the High Court—Under Art 226 Constitution of India 1950—Nature and scope of 267

Jurisdiction—To start a history sheet under U P Police Regulation 228—Some basis or material necessary pointing to one being a confirmed or professional criminal—Where such administrative steps arbitrary and without any material and so without jurisdiction High Court has power under Art 226 to quash it 115

Jurisdiction exclusive—Of the prescribed authority under s 6 A U P Panchayat Raj Act 1947—To decide questions of disqualification—Confined to cases or occasions outside the province of an election petition 229

Jurisdiction of Civil Courts—Not barred under s 235(m) U P Land Revenue Act 1901—In matters connected with the claim or recovery of revenue or sums made realisable as such—Where plea of lack of power or *mala fide* is raised 341

Labour Commissioner and Deputy Labour Commissioner—Scope of authority of to refer under s 11 A U P Industrial Disputes Act 1947 an industrial dispute existing or apprehended to a Labour Court or Tribunal for decision 141

Labour disputes pending before different authorities—Permission to dismiss an employee obtained in good faith from one authority only—Prosecution under s 14 U P Industrial Disputes Act 1947 for omission to secure permission from the other authority—If valid—Defence of act done in good faith under s 22—If available 401

Landlord and Tenant—*Allotment of a portion of a house—Consent of the landlord—Need of the landlord—No enquiry into the bona fide of the need—Order of the Rent Control and Eviction Officer validity of—Rules 6 and 7 under the Rent Control and Eviction Act, applicability of—Civil Procedure Code 1908 s 80—Notice to the Rent Control and Eviction Officer, scope of—Writ jurisdiction scope of*

The plaintiff appellant is the owner of a house of which the room in dispute is a part On 13th August 1950 the plaintiff got possession of this room in execution of a decree for ejectment against Nand Kishore a tenant On 14th August 1950 the plaintiff informed the Rent Control and Eviction Officer that he needed this room and prayed that it may be released to him One Shyam

Sander applied to the Rent Control and Eviction Officer that the room be allotted to Ram Khelawan for starting a betel shop. The Rent Control and Eviction Officer asked the landlord for particulars and again pressed that he genuinely needed the accommodation for his personal use and it should be allotted to him. On 19th August 1950 the plaintiff supplied the particulars and again pressed that he genuinely needed the accommodation for his personal use and it should be allotted to him. On 19th August 1950 the room was allotted to Ram Khelawan without the evidence having been taken for the mind of the plaintiff. On 29th August 1950 the plaintiff was informed of the order of 19th August 1950. On 29th August 1950 the plaintiff filed a suit for injunction restraining the defendant no. 2 Ram Khelawan from obtaining possession of the room in dispute under the allotment order passed in his favour by the Rent Control and Eviction Officer and an order of permanent injunction restraining the Rent Control and Eviction Officer the defendant no. 1 from enforcing the order of allotment. The defence of defendant no. 1 was that the suit is barred by want of notice under s. 80 Civil Procedure Code and is also barred under ss. 19 and 16 of the United Provinces Control of Rent and Eviction Act that the allotment order has been duly passed in favour of defendant no. 2 and that the plaintiff has no cause of action against the defendant no. 1. The defendant no. 2 did not file any written statement. The suit was dismissed by the trial court and the lower appellate court also dismissed the appeal and the learned single judge also held that the suit was barred. A special appeal is filed.

Held, (i) that there is nothing on the record to show that the Rent Control and Eviction Officer ever tried to enquire into *bona fide* of the needs of the landlord and did he issue a notice to the landlord when only one of the rooms of the house had fallen vacant. Hence the order of the Rent Control and Eviction Officer has been passed without compliance of the rules framed under the Act.

(ii) that the right of the plaintiff to occupy his house is a valuable right. If he needed it *bona fide* in lieu under the rules a right of allotment in his favour for this purpose it seems was absolutely necessary which was not given to him. Actually as required by rule 7 no enquiry was made from him about the desirability of the tenant.

(iii) that where an order is to be passed under rule 7 of 1947 then in that event, since the proceedings are of a quasi-judicial nature the order itself would be of a quasi-judicial nature and if the provisions of the Act are not followed or even if the principles of natural justice are not followed the order would not be sustainable.

(iv) that since the disputed room is in a portion of the house wherein the appellants are themselves living, he would be most reluctant to have that kind of shop in their house where all sorts

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of undesirable people might visit and under the circumstances the allotment order is bad in law

(v) that there cannot be the least doubt that the order of allotment has been made without the consent of the landlord and hence the order is bad in law

(vi) that it has been so often decided as to have become almost an axiom that in public statutes words only directory permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in the advancements of public justice

(vii) that the order of the Rent Control and Eviction Officer cannot be supported as it is in direct breach of rules 6 and 7 of the Act

(viii) that the suit is not barred under ss 15 and 18 of the U P Control of Rent and Eviction Act

(ix) that so far as the defendant no 1 is concerned no relief can be granted in the suit itself as notice under s 80 Civil Procedure Code was not given but as against defendant no 2 he would be restrained from taking possession of the premises under the allotment order which has been passed

(x) that though it may not be possible for this Court to grant a decree in the suit but this Court has a jurisdiction under Art 226 of the Constitution to grant the relief as against the defendant no 1 even though this matter has no come in its writ jurisdiction on application under Art 226 because if in the office of the Rent Control and Eviction Officer the allotment order continues in favour of defendant no 2 who is restrained from taking possession there is likely to be a conflict and it may be difficult for the Rent Control and Eviction Officer to have any further allotment order)

Abida Begam v Rent Control and Eviction Officer Lucknow 91

Landlord and Tenant—*House—Suit for ejectment—Purchase of a house—Application for possession—Permission by the Rent Control and Eviction Officer—Notice under s 106 Transfer of Property Act, 1882—Permission under s 3 of the Control of Rent and Eviction Act—Notice validity of—Transfer of Property Act 1882 s 106 and Control of Rent and Eviction Act, 1947 s 3 applicability and scope of—Suit, maintainability*

In suit no 185 of 1955 the plaintiff became the owner of a house by means of a sale deed dated the 29th June 1953 He then tried to obtain possession of the house He sought permission of the Rent Control and Eviction Officer to eject the defendant and an order dated the 5th December 1955 was passed as follows

I allow eight months time to the opposite party no 1 and six months to opposite party no 4 from the date of

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making this order to find out premises for themselves The applicant will be permitted if the opposite party nos 1 and 4 do not vacate the house within the given time

The house was not vacated and a notice dated 19th December 1954 purporting to be under s 106 Transfer of Property Act was served upon the defendant no 5 on 21st December 1954 in which he was asked to vacate the premises by the 31st January 1955

In between on the 20th December 1954 the plaintiff filed an application for permission under s 3 of the Control of Rent and Eviction Act for filing a suit On the 19th February 1955 permission was granted by the Rent Control and Eviction Officer and on the 14th April 1955 after obtaining permission the suit was filed

The defendant went up in appeal against the order under s 3 to the Commissioner and the appeal was allowed on the 14th August 1955 with the result that there was then no existing permission The plaintiff filed a revision against the order of the Commissioner to the State Government and on the 7th January 1956 before the suit was disposed of the State Government allowed the revision set aside the order of the Commissioner and restored the permission granted by the Rent Control and Eviction Officer on the 19th February 1955

The defence to the suit was that the notice under s 106 Transfer of Property Act dated 19th December 1954 was given prior to the obtaining of permission which was granted on the 19th February 1955 and therefore notice was ineffective and the suit bad in law

Held (i) that the permission was granted by the order dated the 5th December 1955 but even if no permission was granted it was permissible for the plaintiff to give a notice under s 106 Transfer of Property Act even prior to permission having been granted under s 3 of the Control of Rent and Eviction Act

(ii) that a notice under s 106 Transfer of Property Act will not be dependent on the existence of permission It can be given before the permission simultaneously on the same date when the permission is sought and accorded or after the permission has been granted The notice was a valid one and the suit was decreed

Jankı Prasad Hanuman Prasad *v* Harish Chandra Tewari 284

Landlord and Tenant—*Permission to file a suit for ejectment by the Rent Control and Eviction Officer—Revision—Remand—District Magistrate delegation of power—authorization General or Special—United Provinces Rent Control and Eviction Act 1947 s 2 (i) scope of*

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Held that the District Magistrate in s 2(*d*) of United Provinces Rent Control and Eviction Act 1947 means that the District Magistrate may authorize any officer to perform his functions under the Act but while the District Magistrate may authorize some other officer to perform his functions under the Act he himself all the time retains the powers to exercise his functions and the District Magistrate will also have the power to withdraw any case from the file of the officer who has been authorized by him The authorization may be general or special and the language of the s 13 consonant with special authorization in respect of any particular case and is not restricted to a general authorization

Basant Lal Shukla v Shrimati Tarawati Shukla 620

Landlord and Tenant—*Suit for possession—Possession under the compromise till 30th June 1952—Adhivasi rights scope of over ejectment—Zamindari Abolition and Land Reforms Act* 1950 ss 20(2),(ii) 209 231 *and* 234 *scope of*

S was a hereditary tenant of certain plots of land in a village On 1st July 1942 S tabled these plots to J P and others who were defendants to the suit S was succeeded by his two sons S I and P who filed a suit for ejectment and declaration of the above lands against the defendants On 5th March 1948 there was a compromise between the parties under which the defendants were to pay Rs 30 per month as rent up to 30th June 1952 and the defendants were permitted to continue as sub tenants up to 30th June 1952 when they were to give up possession of the plots to S I and P The defendants did not give possession and after the expiry of 30th June 1952 S I and P the plaintiffs filed a suit for possession against the defendants who pleaded that they were *adhivasis* under s 20 of the Zamindari Abolition and Land Reforms Act and were not liable to ejectment Upon a Second Appeal by the defendants

Held (i) that the defendants had acquired adhivasi rights under s 20(*a*)(ii) of the Act and after acquiring *adhivasi* rights they were entitled to retain possession of the land in respect of which they acquired these rights

(ii) that the defendants acquired *adhivasi* rights independently of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Zamindari Abolition and Land Reforms Act Their rights were not subject to anything which they had said or undertaken under the compromise

(iii) that s 209 of the Act did not apply as the defendants were persons who were in possession of the property under the provisions of the Statute

(iv) also that s 234 of the Act is inapplicable as the provisions laid down for ejectment do not apply to this case

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(v) also that the grounds on which the ejectment of an *adhwan* could be sought had got to be at any rate *ejusdem generis* the grounds mentioned in s 234 of the Act and the suit of the plaintiffs was liable to be dismissed

Jwala Prasad v Sumiran 819

Lease agreement—With respect to certain plots of land—Made on assumption of either parties that sitting tenants would vacate on expiry of the existing term—Tenants wrongfully refused to vacate—Agreement if suffers from a common mistake of fact and rendered void under s 20 Indian Contract Act 1872 561

'Legal insanity'—Not the same thing as medical insanity—Difference and distinction between—as envisaged by s 84, Indian Penal Code 1860 216

Legislature—If can delegate its essential functions 38

Limitation—For an application for reference to arbitration under s 20 Arbitration Act 1940—If governed by Art 181 Indian Limitation Act 1908 239

Limitation—Of 4 months by which an award is to be made under para 2 First Schedule Arbitration Act 1940 by the arbitrator in the alternative—To be reckoned from the date of his entering on reference 328

Locus standi—Of plaintiff found against him in earlier suit—If operates as *res judicata* in subsequent similar suit under s 11 Code of Civil Procedure 1908 347

Minor assets—Of a estate belonging to the intermediary—if can be adjusted in the assets of other estates belonging to him 671

Municipal Board—Power to levy toll confined to entry from places outside its local area 679

Municipal Election—*Ballot paper marked on the back only—Whether and when to be counted—United Provinces Municipalities (Conduct of Election of Members) Order, 1955 paras 48 64(1)(g) and 64(2)*

A ballot paper is not liable to be rejected simply because it is marked on the back only If the symbols are distinctly visible on the reverse and the mark placed thereon clearly indicates the candidate for whom the vote has been cast there is sufficient compliance with the provisions of the United Provinces Municipalities (Conduct of Election of Members) Order 1955 for a duly marked ballot paper

Swarup Singh v Election Tribunal Municipal Board Aligarh 608

Municipal Election—*Votes polled by candidates for membership rendered equal by the finding of the Election Tribunal—Power of the Tribunal to draw and decide by lot—United Provinces Municipalities Act, 1916 ss 24(1) and 25—*

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United Provinces Municipalities (Conduct of Election of Members) Order, 1953, r. 67

In matters relating to the declaration of a duly elected candidate the jurisdiction of the Election Tribunal under the Municipalities Act is co-extensive with that of the Returning Officer and therefore where the number of votes polled by rival candidates for membership of the Board are tended equal by the finding of the Tribunal it is competent for the Tribunal itself to draw lots and declare the candidate duly elected as a result of the same

Tridok Chand v. The Election Tribunal Meerut 234

Natural Justice—Principles of—Where and when can be invoked by a court 451

Notice—For ejectment of a tenant from the premises let out under s. 106 Transfer of Property Act 1882—If dependent on and invalid for want of permission from the Rent Control and Eviction Officer under s. 3 U. P. Rent Control and Eviction Act 1947—Permission later accorded if validates the same—Maintainability of suit thereafter 284

Notice—Under s. 80 Civil Procedure Code 1908—Served on Government—Fixes scope of prospective suit—Any further plea not specified in the notice not permissible 561

Notice of accident—Under s. 10 of the Workmen's Compensation Act—Want of it—If fatal to the claim 663

Notice—Under s. 34 (1) (a) Income tax Act—For re-assessment—When can attract application of the second proviso to sub-s. 3 of s. 34 of the said Act—As being in consequence of or to give effect to any finding or direction in the order of the appellate authority 152

Objection—On a point of law not involving or depending on a question of fact—If may be raised for the first time in appeal 561

Objection to validity of prosecution under s. 182, Indian Penal Code, 1860—When to be taken 187

Offences not exclusively triable by the Court of Session—*Proceedings before the Magistrate—Subsequent decision to commit to Sessions—Procedure to be followed—Effect of non compliance—Code of Criminal Procedure, 1898 ss 208 211 212 213 347 (1) and 537*

If a case not exclusively triable by the Court of Session proceeds as a warrant or summons case and the Magistrate at a later stage decides to commit the accused to Sessions it becomes obligatory to proceed under s. 347(1) of the Code of Criminal Procedure and for that reason to follow the procedure laid down under ss 208—213 of the Code not of course *de novo*, but only in so far as not covered by the earlier proceedings

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Accordingly if the Magistrate after the statement of the complainant under s 200 of the Code issues summons to the accused for a charge under s 406 Indian Penal Code—Offences alleged in the complaint being in this connexion, immaterial—examines the prosecution witnesses records the statement of the accused hears arguments and then frames a charge and commits the accused to the Court of Session without complying with the provisions of s 208 of the Code informing or enabling the accused if he so likes to avail of his right to give evidence in defence—the possibility of his choice not to lead such evidence being for this purpose irrelevant the committal is bad in law

The breach of s 208 is of itself sufficient to cause prejudice to the accused and failure of justice and there is no question of the application of s 537 of the Code in such circumstances The commitment must therefore be quashed on this ground alone

Quaere whether the same consequences must essentially follow a mere breach of ss 221 212 and 213 of the Code

Chhadami Lal Jain *v* State of Uttar Pradesh 650

Onus—Of establishing an exception in favour of the accused person in a criminal trial—Rests on whom—Its extent and mode of discharge 255

Option—To terminate agreement any time at will vesting in the hirer—Distinguishes hire purchase agreement from sale transaction 303

Ordinance—Circumstances and grounds prompting its promulgation to the satisfaction of the Governor—If justiciable 267

Panchayat Raj Election—*Disqualification of candidates for—Jurisdiction of Election Tribunal to decide—United Provinces Panchayat Raj Act, 1947 ss 5 5A, 5B, 6 and 12—Panchayat Raj Rules rr 14 15 C, 24 and 25*

The exclusive jurisdiction of the prescribed authority under s 6 A of the Panchayat Raj Act to decide questions of disqualification is meant for and must be confined to cases or occasions outside the province of an election petition and there is nothing in the Act or the Rules to exclude from the jurisdiction of the Election Tribunal the determination of that question when it arises in an election petition

Amarnath Singh *v* Sub Divisional Officer Gyanpur 229

Parliamentary Elections—Election Petitions in—Security for—Deposit of under the head of account prescribed by Central Government—Whether sufficient compliance with law—Representation of the People Act 1951 s 117 204

Partition Decree—*Adjustment of maintenance allowance—Execution of the Decree—Objection under s 47 Civil Procedure*

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Code—Reduction of the debt—Uttar Pradesh Zamindars Debt Reduction Act 1952 ss 2 4 and 9 and s 2 cl VI scope of—Appeal maintainability of

Kishori Lal wife of R the appellant was the taluqdar whose estate was under the Court of Wards in district Gonda She died in 1946 and B B Singh and his transferee R Singh filed a suit for possession against R the husband the defendant no 2 and the Deputy Commissioner Gonda as the Manager of the Court of Wards On 15th September 1947 there was a compromise between the plaintiffs and the defendant no 2 under which each was entitled to a one third share of the property in suit On 18th April 1948 a final decree for partition was passed

Rs 500 was paid to the husband the defendant no 2 by the Court of Wards by way of maintenance and on 7th September 1948 there was an order by the Court of Wards under which it was ordered that this maintenance allowance which was paid since the date of compromise namely 15th September 1947 will be debited against the share of the defendant no 2 at the time of the release of the share from the Court of Wards If there will be cash balance then the amount will be deducted from share of the defendant no 2 the movables—otherwise his share in the movables will be reduced proportionately On 19th September 1951 there was a compromise and it was agreed that the Court of Wards defendant no 1 shall adjust accounts between the parties by 15th October 1951 in such a way that payments made to the defendant no 2 shall be adjusted from his share of the property and if any balance is still found payable from defendant no 2 it shall be regularly paid as the first charge out of the share of the profits of defendant no 2 after the payment of Rs 500 per month to the defendant no 2 In case the zamindari is abolished the payment to the plaintiff on account of the aforesaid dues from defendant no 2 shall be a first charge on the estate or the compensation which may be payable to the defendant no 2 and shall be realizable at once by execution of decree against such compensation or the share of the estate of defendant no 2 in suit

When accounts were done it was found that there was an extra sum which had been paid to the defendant no 2 the appellant and decree for that extra sum was passed in favour of the plaintiff

On 26th June 1955 R Singh filed an application for execution of about Rs 12 000 before the District Judge praying that the amount be realized from interim compensation money by attachment and a similar application was filed by the other plaintiff The defendant objected that interim compensation was not liable to attachment under s 47 that the decree was in the nature of a debt within the meaning of Act 15 of 1952 and the decree

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Held (i) that the applicability of the Zamindars Debt Reduction Act cannot be taken under s 47 Civil Procedure Code before the executing court as the objection does not relate to the satisfaction and discharge of the decree and it is only the court which has the decree that can reduce the debt and the executing court has not been given the right to reduce the amount of the decree

(ii) also as the objection does not relate to s 47 the appeal against the order is also not maintainable

(iii) that the amount which is due on account cannot be called as a debt or as an advance and the transaction does not amount to a debt and U P Zamindars Debt Reduction Act is not applicable at all

(iv) further that even if it be assumed that it was an advance in cash and was a transaction which in substance amounts to a debt yet on account of cl VI of s 2 of the U P Zamindars Debt Reduction Act it would be exempted within the meaning of debt as defined in the U P Zamindars Debt Reduction Act

(v) further that if the above Act does not apply then s 9 of the Act would also not apply because it applies to a decree to which that Act applies the execution application is maintainable and the objection of the defendant is dismissed

Raj Kumar Har Shanker Singh *v* Shri Ranjeet Singh 640

Permission—To dismiss an employee obtained in good faith from one authority only while labour disputes pending before different authorities—Prosecution under s 14 U P Industrial Disputes Act, 1947 for omission to secure permission from the other authority—If valid—Defence of act done in good faith under s 22—If available 421

Plea—Of lack of power or *mala fides* if alleged—Jurisdiction of Civil Courts not barred under s 229(2) U P Land Revenue Act, 1901—In matters connected with the claim or recovery of revenue or sums made realisable as such 541

Possession—To make over of certain holdings in terms of a compromise in a suit for ejectment under which the holdings had to be vacated by a particular date—Adhivasi right acquired meanwhile—Compromise to vacate if can be enforced 519

Power of assessment—*Exercise of by the Income Tax Officer—Whether biased and transgressing principles of natural justice—Validity of proceedings*

The petitioner had been duly assessed to income tax for the assessment years 1940-41 to 1946-47 In December 1954 he received seven notices under s 34 (1A) of the Income Tax Act for submitting a further return of his total income for each of the

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said assessment years In a petition challenging the validity of the proceedings

Held, (i) (*Per* BHARGAVA and CHATURVEDI JJ UPADHYA, J *contra*) that s 34 (1 A) of the Income Tax Act did not violate the prohibition contained in Art 14 of the Constitution and was a valid piece of legislation because

(*a*) the assessee proceeded against under s 34(1 A) had with regard to appeal revision or reference the same rights as one under s 34(1) since notwithstanding the difference in the phraseology of the corresponding provisions in the two sections viz and thereupon the provisions of this Act [excepting those contained in cls (i) and (iii) of the proviso to sub s (1)] shall so far as may be applyingly accordingly in the former and the provisions of this Act shall as far as may apply accordingly as if the notice were a notice issued under [section 22(2)] in the latter s 22(2) was equally applicable to both cases

(*b*) the difference resulting from the fact that the proceedings under s 34(1) was subject to a prescribed period of limitation while that under s 34 (1 A) was free from any such restriction fell within the limits of permissible classification inasmuch as the latter was meant for a special class of invaders whose income during the war period amounted to a lakh of rupees or more

(*Per* UPADHYA J)—that the additional words as if the notice were a notice issued under [s 22(2)] in s 34(1) were not superfluous and could not be imported into s 34(1 A) with the result that the provisions regarding appeals etc could not be available to an assessee proceeded against under the latter section The provisions of and the proceedings under s 34(1 A) therefore offended Art 14 of the Constitution and were accordingly invalid

Observations of the Supreme Court in *Shree Meenakshi Mills Ltd* v *Sri A V Viswanatha Sastri* relied on by BHARGAVA, J explained on the ground that the relevant point therein was assumed and could not in any sense be said to have been decided

(ii) (Unanimously) the the proceedings before the Income tax Officer were no doubt judicial It is however difficult to see how the Income tax Officer may be said to have a bias or personal interest in the matter of assessment so as to violate the principles of natural justice that no one can be a judge in his own cause and even assuming it to be so the defect is cured by a provision for appeal and hearing before higher and wholly independent tribunals Moreover the principles of natural justice cannot be invoked for attacking the validity of an express provision to the contrary in the Act

Jai Kishan Srivastava v Income tax Officer Kanpur 451

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Pradhan of Gaon Sabha—*Age of as recorded in the family or adult register—Whether final and conclusive and not liable to be re opened in election petition—United Provinces Panchayat Raj Act 1947 ss 5 B and 12 C Panchayat Raj Rules r 5(2)*

The expression used in rule 5(2) of the Panchayat Raj Rules is that the register so republished shall be final and not it need be noticed final and conclusive which has been used in other parts and for other purposes in the Act The finality attached to the register relates to and must be confined to proceedings anterior to rule 5(2) dealing with the general preparation of the register of members of the Sabha and the entries therein are open to revision or correction by prescribed authorities in appropriate cases such as those under rules 6 to 11

The Election Tribunal is therefore quite competent to go behind the relevant entry in the register and to find on the evidence adduced the actual age of the person elected as Pradhan

Quaere Whether the question of a person being an adult and entitled to vote in the election of the Pradhan may be agitated in the election petition notwithstanding the fact that he was so recorded in the adult register?

The Full Bench decision in *Ghulam Mahuddin v The Election Tribunal of Town Area Sahit*, I L R 1959 All 157 distinguished on the ground that the franchise in question under the Town Areas Act was conferred on persons whose names had been entered in the electoral rolls whereas that under the Panchayat Raj Act was available to adults only

Babu Ram v State of Uttar Pradesh 309

Prejudice to the accused—When caused—Breach of s 208 of the Code of Criminal Procedure 650

Private defence of body—Right extends to the voluntary causing of death where an assault is made with the intent of abducting 633

Proceedings—In an Election Petition—If of a civil nature—For purposes of certificate from the High Court for appeal to the Supreme Court—Under Art 133(1)(c) Constitution of India 1950 487

Proceedings—Under Rules 4 6 7 U P Rent Control and Eviction Act 1947—Are of a quasi judicial nature—Orders thereunder are also such—So not sustainable if provisions of the Act or principles of natural justice not followed 96

Prosecution—Under s 14 U P Industrial Disputes Act 1947 for omission to secure permission to dismiss an employee from a particular authority—While labour disputes pending before different authorities and permission to dismiss the employee secured in good faith from one authority only—Defence of act done in good faith under s 22—If available 421

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Protection—Of Art 14 of the Constitution available to a Government servant against any action amounting to a purposeful discrimination as distinguished from a *bona fide* exercise of power under Art 310 53

Public Servants—As defined in s 21 Indian Penal Code 1860 include Railway servants after the nationalization of railways —Irrespective of the consideration that s 137(1)(4) provided that for the purposes of offences under Chapter IX of the said Code every Railway servant shall be deemed to be a public servant 536

Punctuation marks—In a statute—If part thereof and can be relied on in construing it 553

Railway Servants—*Whether and how far Public servants —Prevention of Corruption Act, 1947 ss 2 5(2) 5(1)(c) and 5(1)(d)—Indian Penal Code, 1860 ss 21 409 and Ch IX—Indian Railways Act, 1890 ss 137(1) and 137(4)*

After the nationalization of railways railway servants became and are public servants within the ambit of s 21 of the Penal Code and for the purposes of the Prevention of Corruption Act without any recourse to the statutory fiction introduced by s 137 of the Railways Act and there is accordingly no reason to restrict it to offences under Chapter IX and s 409 of the Penal Code Moreover the restriction is irrelevant where the offence in question is covered by s 5 of the Prevention of Corruption Act itself

P R Chaudhry v State of Uttar Pradesh 336

Reference—By a Court to the High Court stating a case for opinion—Under s 113 Civil Procedure Code—When to be made 88

Registration—Compulsory of a lease or an agreement to lease creating a present demise of immovable property from year to year or for a term exceeding one year under s 17(1)(d) read with s 2(7) Registration Act 1908 561

Relief—If ineffective or merely of academic interest court should be reluctant to grant 167

Rent Control and Eviction Officer—Under the U P (Temporary) Control of Rent and Eviction Act 1947—If subordinate to and subject to control in the matters for determination under the Act by the District Magistrate as the Superior Administrative or Executive Officer 403

Res judicata—*Finding inter alia on locus standi of plaintiff in earlier suit—Whether operates as res judicata in subsequent suit—Code of Civil Procedure, 1908 s 11*

A suit for redemption of mortgage was dismissed by the trial court on the ground that the mortgage had not been proved The appeal against this was dismissed on the findings firstly that

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the plaintiff was not the successor of the original mortgagor and secondly that the mortgage was not established In the subsequent suit between the same parties and in respect of the same plots

Held that the finding of the appellate court on the first point in the earlier suit operated as *res judicata* in the later suit since in the proper sequence of the matters in issue the first point for determination in every case is the *locus standi* of the plaintiff and the finding thereon cannot be said to be incidental or unnecessary

Ram Jiwan Misir v Jiwan Misir 347

Revenue—*Claims and recovery of—Plea of lack of power or mala fides—jurisdiction of Civil Courts, whether barred—United Provinces Land Revenue Act* 1901 *s* 233 (m)

The bar under s 233(m) of the Land Revenue Act to the jurisdiction of the Civil Courts in matters connected with the claim or recovery of revenue or sums made realizable as such does not apply to cases of want or *mala fide* exercise of power in or by the Government or authority concerned

Deo Prang Singh v Uttar Pradesh Government 541

Revision—Before the Board of Revenue under s 252 U P Zamindari Abolition and Land Reforms Act 1951—Not governed by the U P Tenancy Act 1939 nor rules framed there under including r 190 Revenue Manual 17

Revisional Jurisdiction of the High Court—Nature and scope of as provided in s 115 Civil Procedure Code 1908 25

Revisional power—Of High Court—Under s 439 Criminal Procedure Code 1898—Exercise of in appropriate cases—*Suo motu on information received* 528

Sale and Hire-purchase—*Distinction of*

The plaintiff applicant and the defendant opposite parties agreed as follows

(1) That the defendant opposite parties have taken a new Hind Genet Cycle with all the accessories on hire at Rs 12 8 0 per month from the Alliance Agencies Lucknow

(2) That the hirers will pay the hire in advance within the first week of each month

(3) That if the hire is paid regularly without any break for a period of 12 months and when a total sum of Rs 148 has been paid the amount of hire paid will be treated as safe money and the hirer no 1 will automatically become the owner of the bicycle

The opposite parties took the cycle and paid a sum of Rs 72 8 0 in instalments The payment was then stopped and the plaintiff sued to recover Rs 272 4 as hire money for 23 months The defence was that the plaintiff could claim only the balance of the

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sum of Rs 148 which had been agreed to as the price of the cycle after deducting payment already made This defence was accepted and the trial court decreed the suit for Rs 75 8 only A revision was filed against this order

Held that to determine whether the transaction amounts to a sale or a hire purchase agreement the test is whether a real option has been given to the alleged hirer to terminate the agreement at any time he likes

If such an option is given to him the transaction amounts to a hire purchase agreement If on the other hand there is no such option and the alleged hirer has to pay the entire amount the transaction is a sale

Shyam Kumar Verma *v* S P Misra 303

Sale-proceeds—Of old grain stock sold during the previous year —If can be included in the Agricultural income of the assessment year 1355F under the U P Agricultural Income Tax Act 1948 355

Sales Tax—*Assessment year and previous year, distinction of*—*U P Sales Tax Act 1948 s 7 (prior to amendment in 1954) Sub clause 3 scope of*

Held, that it is wrong for the Sales Tax Officer to assess the liability of a firm to tax on the basis of its turnover for the assessment year as sub clause 3 of s 7 of the U P Sales Tax Act provides that in assessing the tax to the best of his judgment the Sales Tax Officer shall take into consideration the turnover of the dealer for the previous year

Messrs Chhajjoo Ram Mool Chand *v* State 331

Sanction—Of the District Magistrate necessary under s 19 Indian Arms Act 1878 for prosecution under s 19(f) of the said Act in the districts of Avadh 185

Sentence of death—Necessarily to follow a conviction under s 396 Indian Penal Code—Dacoity with murder 391

Sessions Judge—Duty and power of while treating evidence before the Committing Magistrate during preliminary enquiry at evidence in the Sessions trial under s 228 Criminal Procedure Code 1898 136

Single Member, Board of Revenue—Power of to alter or reverse a degree or order passed by the Board or any other member in proceedings under the Zamindari Abolition and Land Reforms Act 1951 not fettered by the provisions of s 220(3) U P Land Revenue Act 1901 173

Status of a railway servant—That of a public servant under s 2 Prevention of corruption Act 1947 336

Statutes—Interpretation of—How and when to be deemed prospective and when retrospective 267

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Statutory warranty—Ensured by provisions of s 55(2) Transfer of Property Act 1882—If available besides express contract of certain indemnity in the event of breach of warranty of title

Steps in suit—Unauthorized application for adjournment by a Pleader without authority or an application for setting aside *ex parte* order are not such—Application entitled to stay of suit regarding the matter agreed to be decided through arbitration pursuant to s 34 Arbitration Act 1940 555

Suit for eviction—*Permission for granted by the Rent Control and Eviction Officer—Power of District Magistrate to secure or suggest variation of the same—United Provinces (Temporary) Control of Rent and Eviction Act 1947 s 3*

The application for permission to sue for eviction under s 3 of the Control of Rent and Eviction Act being rejected by X the Rent Control and Eviction Officer the appellant filed an application to the District Magistrate who sent it on to X with the direction Please reconsider the matter after hearing the parties whereupon X gave a further hearing to the parties and granted the requisite permission

Held that an order once passed by the Rent Control and Eviction Officer cannot be cancelled or varied by the District Magistrate or by the Rent Control and Eviction Officer acting under the direction or suggestion of the District Magistrate

The District Magistrate cannot in this context be said to be an officer superior to the Rent Control and Eviction Officer Moreover the power of a superior administrative or executive officer to control and guide his subordinates can if available to him be exercised before and not after the passing of an order

Quaere Whether the Rent Control and Eviction Officer could review the order on his own initiative and as a result of the exercise of his individual and independent judgment

Munnalal Goel *v* Sri Kishan Pahalwan 40

Suit on contract against Government—*Notice for—Scope—Objection as to unenforceability of contract whether and when may be raised for the first time in High Court—Code of Civil Procedure 1908 O XLI r 2 s 80*

An objection on a point of law which does not involve or depend on question of fact may be allowed to be raised for the first time at the stage of arguments in appeal before the High Court

The objection to the enforceability of a contract subject to the plea or fact of ratification cannot therefore be allowed to be raised for the first time in appeal unless the plea is not at all available to the other party as for instance where the notice served

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on the Government under s 80 of the Code of Civil Procedure—which is strictly construed and fixes the scope of the prospective suit—does not mention or rely on ratification

U P Government v Nanhoomal Gupta 561

Super Tax—Payable by an assessee with over Rs 25 000 agricultural income under the U P Agricultural Income Tax Act 1949—If subject to the condition (b) in the Rates Schedule proviso in Part I of the Act that in no case Agricultural Income Tax shall exceed half the amount by which the total agricultural income exceed Rs 3 000 858

Supreme Court Appeals—*Consolidation of, for purposes of pecuniary valuation—Requisites of—Code of Civil Procedure 1908 O XLV r 4—Constitution of India 1950 Art 133 (1) (c)*

Of the six writ petitions arising out of six different suits on the basis of six different leases given to different persons one was dismissed on the 6th October 1958 and the rest were dismissed on the 7th October 1958 by a short order in each case This petition is concluded by our order dated the 6th October in Civil Misc Writ no 2654 of 1958 We therefore reject it

In an application for the consolidation of these cases for the purpose of pecuniary valuation in appeal to the Supreme Court under Art 133(1) (c) of the Constitution—

Held that the cases cannot be said to have been decided by the same judgment and were therefore incapable of consolidation

In suits involving substantially the same question for determination O XLV r 4 of the Code of Civil Procedure permits consolidation if they are decided by the same judgment and forbids consolidation if they are decided by separate judgments and if separate judgments even though identical in terms be treated as the same judgment there would be little left of the diversity envisaged in the two portions of the rule

Bhagwan Singh v Bhawani Das held obscure and therefore no authority on the point

Hori Lal v Board of Revenue U P 245

Tenant—Suit for ejectment of from the premises let out—if maintainable where the notice under s 106 Transfer of Property Act 1882 for the purpose preceded permission granted by the Rent Control and Eviction Officer under s 3 U P Rent Control and Eviction Act 1947 284

Testimonial Compulsion—Order under s 94 Code of Criminal Procedure 1898 for production by an accused person of a document in his possession and likely to be used against him—invalid under Art 20 (3) Constitution of India 1950 132

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Toll—*Power of Municipal Board to levy—Restriction on—United Provinces Municipalities Act, 1916 s 128(viii)*

Subject to any general rules or special orders of the State Government the power of the Municipal Board to levy toll on vehicles etc under s 128 (viii) of the United Provinces Municipalities Act is confined to those entering the Municipality from places outside its local area

The owner of a truck carrying coal from the goods shed which is included within the municipal limits although the rest of the railway station is excluded therefrom is therefore not liable to the payment of toll claimed by the Municipal Board

The Municipal Board Mainpuri v Kanhaiya Lal 679

Treasury Rules—In Vol I of the Compilation of the Treasury Rules published by the Government of India except in Part XIX are statutory rules framed by the Governor General under s 151 (1) of the Government of India Act 1935 and have the force of law 204

———*Statutory force of Government of India Act 1935 s 151 of 26 Geo 5 Ch 2—Certiorari—Whether and when available to correct an order based on a disregard of law—Constitution of India 1950 Art 226*

The decision of this Court in *Bhiwanish Bhushan Sharma v Election Tribunal Farrukhabad*, viz if the head of account prescribed by the Central Government for the deposit of security of an election petition was correctly shown in a Government Treasury receipt it necessarily followed that the deposit was in favour of the Secretary Election Commission within the meaning and requirement of s 117 of the Representation of the People Act cannot be said to be based on the evidence led in that case and is therefore of general import and application

Treasury Rules contained in Vol I of the compilation of the Treasuries Rules published by the Government of India except those in Part XIX are statutory rules framed by the Governor General acting under s 151 (1) of the Government of India Act 1935 and have thus the force of law

Courts and Tribunals are therefore bound to take due cognizance of those rules and any judgment or order based on a disregard or in ignorance of the same suffers from a manifest error apparent on the face of the record and is cognizable through a writ of *certiorari*

Abdul Wahid Haji v Balkrishna Vishwanath Keskar 204

Turnover—Of the dealer for the previous year —shall be taken into consideration by the Sales Tax Officer in assessing the tax to the best of his judgment for the assessment year as provided in section 7(3) of the Uttar Pradesh Sales Tax Act 1948 (prior to amendment in 1959)

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United Provinces Agricultural Income Tax Act, 1949 *s* (2) (1) (a) *ss* 5 6 *s* 3(*d*) *s* 6 (2) (*b*) (*c*) *s* 23 *and s* 24 *and Rule* 17 *validity and scope of—Donation to an educational institution —recognized by the State scope of—Hospitals in receipt of grant scope of—Communication of the judgment, under s* 23 *meaning of*

United Provinces Agricultural Income Tax Act is a fiscal Act and it will be interpreted in accordance with the following six principles of interpretation

(1) A fiscal Act must be strictly construed and tax can be imposed on the subject without words in the Act clearly and expressly showing an intention to lay a burden upon him

(2) In cases of doubt it should be construed in favour or an interpretation beneficial to the subject and if two constructions are equally possible and reasonable the construction most favourable to the subject must be enforced

(3) Arguments that the tax falls within the spirit of law or that on equitable grounds tax should be imposed are not available to the Taxing Authority Tax and equity are strangers while interpreting a taxing statute

(4) If there is an exemption it must be construed so far as possible in favour of the assessee and strictly construed as against the State

(5) Such a statute should be interpreted against double taxation but if the assessee is entitled to double advantage on a fair reading of the Act he should be given the benefit of it

(6) Avoidance of income tax within the four corners of the Act would be justifiable

Held (i) that the word derived in s a (1) (a) in the U P Agricultural Income Tax Act means obtained or received and therefore the Agricultural Income of an assessee should be that net amount which he actually realizes or receives and not what one should get or should have realized

(ii) that an assessee is entitled to collection charges on the sum realized by him whether it is realized directly from the tenants or through the thekedars Section 5 of the Act does not specify that the realization on which collection charges would be allowed should be from the tenants and not from thekedars

(iii) that the sale proceeds of the old grain stock sold during the previous year should not be included in the Agricultural Income of the assessment year 1355F

(iv) that the words irrigation productive or protective in the phrase irrigation productive or protective work constructed for the benefit of the land in s 5(*d*) and s 6(*b*) (v) are

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all independent of each other and a work which is either for irrigation or productive or protective will be covered by these two sections Further that the work would be productive or protective either if it actually results as such or it tends to be such It is not necessary that in every case it must result in actual gain if the work is such that it increases the value of the land it will always be of a productive nature

(v) that in order to find whether any expenditure comes under the above head in the two sections or not there are two things which are necessary—

(a) whether the work is either for the purpose of irrigation or productive or protective and

(b) whether it was for the benefit of the land if these two things are present the expenditure would be exempted under this head whether it results in extra income or not is immaterial

(vi) that where on a representation of the State Government the assessee acted *bona fide* in giving certain donations the State would be precluded from charging any income tax over such donations which the assessee has *bona fide* paid in pursuance of rule 17 framed under the U P Agricultural Income Tax Act

(vii) that rule 17 framed under the U P Agricultural Income Tax Act was not purported to have been framed under s 8 of the Act but it had been made under s 44 of the Act and it having been laid before the Legislature and having been acted upon *bona fide* by the assessee who had derived advantage it is not now open to the State to have the law declared *ultra vires* retrospectively to affect the past and completed transactions having taken place on the basis of that rule The answer may have been different if no benefit to the subject had accrued and the State had derived unfair benefit by means of the *ultra vires* rule

(viii) that the Explanation to rule 17 framed under the U P Agricultural Income Tax Act is not to be interpreted and applied independently of the rule and the Explanation to rule 17 is controlled by the rule itself

(ix) that the hospitals which were subject to general inspection by the Civil Surgeon cannot be treated as hospitals in receipt of a grant from the Government within the meaning of the notification issued under rule 17 framed under the U P Agricultural Income Tax Act

(x) that the two powers in sub s (1) and sub s (2) of s 24 are wholly independent The power under sub s (1) to refer a question *suo motu* can always be exercised irrespective of the fact whether any reference has been made under sub s (2) or not

(xi) that if an amount is donated to an educational institution recognized by the State *e g* an university a college or any

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other school which is either recognized by the State Government or by any of the local authority then in that event it would amount to a donation to that institution within the meaning of rule 17 whether it is paid for the purpose of maintenance of the school for payment as scholarships to students for prize distribution for Jubilee celebration or for any other purpose connected with this institution But if the amount is paid directly to students who may be the students of a recognized school the donation would not come within the purview of rule 17 framed under the U P Agricultural Income Tax Act

(xii) that if the amount has been paid to an institution recognized by the State Government or a local authority though earmarked for scholarship it would be a donation within the meaning of rule 17 framed under the U P Agricultural Income Tax Act but simply because the amount has been paid for scholarship to an institution would not make the institution an aided institution within the meaning of rule 17

(xiii) that condition (*b*) in the schedule of rates is applicable to Part I alone and not to both the parts

(xiv) that the knowledge of the order passed by the Revision Board on the 20th March 1954 in revision applications nos 149 150 151 161 162 and 163 of 1953 and to have been derived from a copy of the judgment obtained by the clerk of the counsel for the applicant did not amount to communication to the assessee within the meaning of the word as used in s 23 of the U P Agricultural Income Tax Act and the application for reference consequently is not time barred

Maharaja Pateshwari Prasad Singh *v* State 353

United Provinces Agricultural Income Tax Act, 1948 *Schedule Part I paragraphs A and B scope of—*

Held that the expression Agricultural Income tax in paragraphs (A) and (B) of Part I of the Schedule in the United Provinces Agricultural Income Tax Act does not include sugar tax

Raja Syed Mohammed Saadat Ali Khan *v* State of Uttar Pradesh 149

United Provinces High Courts Amalgamation Order, 1948 *cl 14 scope of—Case arising within the areas, meaning of*

Plots of land in respect of which *bhumidhari* rights were claimed and in respect of which the order of the Assistant Custodian General was made were situate at Meerut which is not one of the areas over which the Lucknow Bench exercised jurisdiction

Held that the case out of which this writ petition has risen did not arise within the area over which the Lucknow Bench

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could exercise jurisdiction under the provision of clause 14 of the Amalgamation Order

Boodan v Assistant Custodian General evacuee Property 108

University—*Election for the Court of the University from the Donors Constituency and from the Constituency of Registered Graduates—Nomination to the Executive Council of the University—Terms to expire by Ordinance—Ordinance validity of—U P Universities Ordinance I of 1959 validity of—Removal of Difficulties (Fourth) and (Sixth) Orders validity of—Constitution of India Article 226 scope of*

The Lucknow University Act 1920 was amended by Act VI of 1955 which came into force on 23rd March 1955 According to that Act 15 members were to be elected for the Court of the University from amongst the donors and 30 members were to be elected from the Constituency of Registered Graduates and five members were to be nominated to the Executive Council of the University by the Chancellor

Anand Narain the petitioner was elected from the Donors Constituency as a member of the Court of the Lucknow University on 7th August 1956 for a period of three years and his term expires on 6th August 1959 Sidh Nath Misra was elected from the Registered Graduates Constituency as a member of the Court of the Lucknow University on 4th August 1956 for a period of three years and his term expires on 3rd August 1959 Prem Narain Tandon was nominated to the Executive Council on 9th October 1956 for a period of three years and his term expires on 8th October 1959

The Removal of Difficulties (Fourth) Order amended the Removal of Difficulties (Second) Order to the extent that the authorities constituted prior to the commencement of Act VI of 1958 shall continue not later than 15th January 1959 notwithstanding the provisions of the Act or the Statutes in force before 7th May 1958 The effect of this order was that Anand Narain and Sidh Nath were to discontinue as members after the 15th January 1959

The Registrar of the Lucknow University the respondent no 2 issued a notice calling for nominations under the new Statute and Act VI of 1958 and fixed 29th October 1958 as the last date for filing nomination papers for the Donors Constituency he also fixed 31st October 1958 as the last date for filing nomination papers from the Registered Graduates Constituency Anand Narain and Sidh Nath Misra the petitioners filed separate writ petitions on 24th and 28th October respectively challenging the validity of the Removal of Difficulties (Fourth) Order of 1958 The nomination of Prem Narain Tandon is determined by the Removal of Difficulties (Sixth) Order of 1959 issued on 5th

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January 1959 which determined all nominations with effect from 16th January 1959 Prem Narain Tandon filed this writ petition challenging the validity of the Removal of Difficulties (Sixth) Order of 1959

Held (i) that the U P Universities Ordinance no 1 of 1959 in no way purports to affect the powers of the High Court It may have affected the rights of a party before the High Court but the powers in the High Court have remained the same If an Act is passed during the pendency of the case which affects the rights of the parties it cannot be said that there has been any delegation from the powers of the High Court which endangers the position of that Court which by the Constitution it is designed to fill The validity of the Ordinance is not affected on this ground

(ii) that the Ordinance passed does not only affect the Lucknow University about which writ petitions are pending in this Court but it has also amended Allahabad Agra and Gorakhpur Universities Acts It was promulgated on 22nd June 1959 when the session of the University soon thereafter was going to start and that would be the right and proper time if any change was required to be introduced so that there may be a new set up of administration from the very beginning of the session

Apart from the fact that the circumstances in which an Ordinance is passed is not justifiable this Ordinance cannot be termed to be a *mala fide* one

(iii) that it is only when a Statute does not specially and in clear words take away vested rights that a Statute will be deemed to be prospective It is open to a legislature to take away a vested right by legislation particularly if it has been vested by a legislation itself

(iv) also that there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the petitioners

(v) that after coming into force of this Ordinance the petitioners have no right left and the petitions must be dismissed

(vi) that Universities are autonomous bodies and the courts should be reluctant as far as possible to interfere with the internal administration of the Universities There should be no occasion for any interference unless there is a palpable violation of law which has occasioned injustice in a broad and general sense The rights of the petitioners in such which needed no interference by the High Court when their terms were determined

Prem Narain Tandon v State of Uttar Pradesh 267

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Unlawful Assembly—Common object of—Test—Weapon and conduct material 18

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 *s 332 B sub-s (2) and (3)—Issue remitted—Jurisdiction—Collector must decide—Civil Procedure Code 1908 s 113—Reference when competent*

A Collector or an Assistant Collector has no jurisdiction to sit in judgment on the view of the civil court remitted an issue to the Collector and has to decide that issue in accordance with the provisions of sub-s (2) and (3) of s 332 B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act

An opinion under s 113 Civil Procedure Code is to be sought when the court itself feels some doubts about the question and not when the court has formed an opinion and acted upon it and that opinion is disagreed with by another court

Tika Ram *v* Maheshwari Din 87

Vakalatnama—In favour of a counsel—When it exhausts itself 487

Vested right, if and when can be determined by the Legislature 267

Void—Power of court to declare any particular statute—Limitations on 451

Warranty of title—*Express contracts of indemnity for breach of Effect of the rights and liabilities under the statutory covenant—Transfer of Property Act 1882 s 55 (2)*

The express contract for the refund of sale consideration in case of vendee's dispossession from the property sold for want of vendor's title does not deprive the vendee of his right to rely if necessary on the statutory warranty ensured by s 55(2) of the Transfer of Property Act and recover satisfaction for the compensation paid in compromising the suit for possession of that property by persons entitled to it

Where the vendor is a party to the suit so compromised and prefers to allow it to conclude *ex parte* as against him cannot insist on or avail of the absence of an express notice to him as a safeguard against improvident bargain

Ram Swarup *v* Fattu 521

Withdrawal of Suit—*Court granting permission—Suit depending on an attesting witness to a will—Failure of justice—Civil Procedure Code s 115 scope of*

The plaintiff filed a suit for declaration of title to some property and the success of the suit depended upon the proof of a will but one of the attesting witnesses to the will was won over by the defendants

The plaintiff believed that he may prevail upon the witness to be honest and truthful and thus later on he may succeed in

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proving the will by the production of this witness The plaintiff therefore applied for the withdrawal of the suit with liberty to bring a fresh suit on the same cause of action and the court permitted the said withdrawal of the suit A revision was filed against the above order

Held (i) that the plaintiff was faced with an incapacity of producing such evidence as the law required under the statutory provisions of s 68 of the Indian Evidence Act and the defect was in the nature of a formal defect

(ii) That the powers of the High Court in revision are not available for correction of errors of law however gross these errors may be and whatever may be the result of these errors on the merits of the case

(iii) Further that the exercise of revisional powers by this Court are discretionary and the High Court can refuse to exercise that discretion unless there was likely to be some substantial failure of justice and in this case it cannot be said that unless the order of the court below is set aside there was any failure of justice much less a substantial failure thereof and unless the plaintiff is given permission to withdraw his suit with liberty to bring a fresh suit later on it was he that was likely to suffer injustice and not the defendants

Sheo Kumar Dwivedi *v* Shri Thakurji Maharaj Bhagwan 25

Will—*Maintenance—Charge on Property—Interpretation of the Will—Indian Succession Act* 1925 *s* 177 *scope of*

Ram Swarup died in 1928 leaving some property and was succeeded by his minor son who also died six months later and his mother the plaintiff Ram Piari became the owner of half of item (b) and item (d) and item (f)

On 11th December 1924 Ram Piari surrendered all her rights in favour of her mother in law Smt Tulsa reserving to herself a right of residence and a sum of Rs 20 per month for her maintenance which was made a charge upon the property

On 19th February 1926 Tulsa executed a deed of relinquishment of the property surrendered by Ram Piari the plaintiff in favour of her husband Debi Din who became owner of it subject to the charge On 1st May 1930 Debi Din executed a will disposing of the entire property Debi Din died Shyam Behari also died in 1940 On 12th December 1946 Ram Piari filed a suit for Rs 900 at the rate of Rs 20 per mensem from 1st December 1938 to the date of the suit under the deed of relinquishment executed by her

Held that merely from the fact that a large amount was given for *guzara* to Ram Piari the plaintiff it cannot be inferred that it appears from the will that the legatee wanted to discharge the debt by giving the legacy

Ram Piari *v* Srimati Brijrani 297

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Words in public statutes—Only directory permissory or enabling —may have a compulsory force where the thing to be done is for public benefit or in advancement of public justice 18

Workman—*Duty—Leave—Course of employment—Accident—Notice if essential—Course of employment meaning of—Compensation—Workmen's Compensation Act, 1923 ss 10 and 3(1) scope of*—

Umrao the respondent was a gateman at the Railway Crossing gate no 218 near Jalalpur On September 4 1955 when he was at his quarters he was attacked by the dacoits who came there to loot the wagons and he sustained injuries on the left hand and right eye He claimed compensation under the Workmen's Compensation Act claiming that he got the injuries in the course of his employment and arising out of it The defence was that the respondent was on sick leave on that day and was not in the course of employment and also no notice as required under s 10 of Act was given within a reasonable time

The Workmen's Compensation Commissioner found that Umrao received injuries in his eyes in an encounter with persons who wanted him to violate the instruction of the Railway authorities Umrao though on sick leave was in the Railway quarters in the capacity of a workman and sustained injuries as such Rs 1 008 was awarded as compensation to Umrao the respondent The Railway has come in appeal

Held (i) that although s 10 of the Workmen's Compensation Act is mandatory with regard to the notice of the accident to be given in the manner provided under the Act but the effect of this mandatory provision is greatly taken away by subsequent proviso to that very section which provides the want of any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if the employer or any one of several employers or any person responsible to the employer for the management of any breach or the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred and the want of notice in the present case is not fatal to the claim

(ii) also that the Commissioner may entertain and decide any claim to compensation if he is satisfied that the failure so to give the notice or prefer the claim was due to sufficient cause

(iii) that if a person is on leave he is not supposed to do any work and could not therefore be on duty and as the accident did not take place during the course of the employment of the respondent he is not entitled to lay any claim against the railway

Divisional Superintendent Northern Railway Moradabad v Umrao 663

Workmen and employer—*Claim for compensation—Oudh Tirhut Railway through its General Manager whether employer for*

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purposes of a claim by the railway servant—Workmen's Compensation Act, 1923 ss 2 and 10—Code of Civil Procedure 1908 s 79

Having regard to the scheme of and the definitions under the Workmen's Compensation Act it seems explicit that a claim by or on behalf of a railway servant against the Railway through its General Manager is a claim against the employer and is maintainable as such A claim to enforce the employer's liability under s 3 of the Act cannot be said to be a suit under the Code of Civil Procedure so as to attract and be defeated by the provisions of s 79 of the Code

Baijnath Singh *v* The Oudh Tirhut Railway 609

Writ—*Common Order—Joint or Separate Writ Application—Scope of*

Held that a writ petition can be filed only by one unless the right is joint and inseparable In the case of a common right it is not open to the persons who are affected by a common order to file a joint writ application

Uma Shanker Rai *v* Divisional Superintendent Northern Railway Lucknow 201

Zamindari Abolition—*Rolls finalized—Amendment in the Act whether retrospective—Amendment of the Rolls scope of—Adjustment of—Minus assets with the other estate of the intermediary scope of—Uttar Pradesh Zamindari Abolition and Land Reforms Act and Rules rule 39 B—sub rule (a) applicability of*

Held (i) that where after the rolls has been finalized the law is amended then unless the law itself provides that it shall have retrospective operation and further any rolls already finalized shall also be amended accordingly it will not authorize the authority concerned to effect any changes much less entitled him to do so on the pretext of removing any mistake or error The proviso added to sub rule a of rule 39 B does give a retrospective operation

(ii) also that where the net assets of a certain estate happen to turn out on the minus side and as a result of which the intermediary in the ultimate analysis gets no compensation therefrom it will not entitle the State to adjust the minus assets in the assets of other estates belonging to the intermediary which too might have been acquired and the alteration made in the Compensation Assessment Roll by the Compensation Officer reducing the amount on the above basis is *ultra vires* and without jurisdiction

Raja Bijai Pratap Singh *v* State of Uttar Pradesh 671

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Keshardeo Chamaria v. Radha Kishen AIR 1953 SC [illegible] relied on [illegible]

Kechardas Lallubhai Patel v. Lalbhai Trikumal Mills Ltd AIR 1959 SC 512 relied on 58, 58-

K F Nariman v. Municipal Corporation (1924) ILR 48 Bom 809 referred to 411

K G Nene v. The Rent Control and Eviction Officer Kanpur 1955 ALJ 778 adopted 411

Khincha Mal Hari Kishan Dass v. Khub Ram Munni Lal 1937 ALJ 766 referred to 617

King v. Francis (1788) 2 Term Rep 484 referred to 444

King Emperor v. Abdul Ghafoor (1929) 27 ALJ 28 distinguished 189

King Emperor v. Angad (1929) 27 ALJ 215 distinguished 189

King Emperor v. Lachhman Singh (1928) ILR 7 Pat 701 approved 190

Kishanlal Nandilal v. Vithal Nagaiya AIR 1956 Nag 276 distinguished 251, 253, 254

Kishori Lal Kunj Bihari Lal v. Commissioner of Sales Tax Civil Reference no 4 of 1955 decided on 30th October 1958 relied on 836

K Kamaraja Nadar v. Kunju Thevar 1958 SCJ 680 relied on 206, 207

Kuru v. Emperor AIR 1930 Cal 445 relied on 263

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Lady Dinbai Dinshaw Petit v. The Dominion of India AIR 1951 Bom 71 relied on 551, 592

Lakhi Narayan Das v. The Province of Bihar AIR 1950 FC 59 relied on 277

Lakhu Prasad Shah The Income tax Officer Central Circle Income tax matter no 14 of 1959 decided on 12th August 1965 distinguished 515

Lalji Singh v. Pyare Lal 1956 ALJ 235 applied 183

Lal Singh v. Emperor AIR 1938 All 645 disapproved 600

Lane v. Herman (1939) 3 AER 858 relied on 560

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Liversidge v. Sir John Anderson LR [1942] AC 206 distinguished 277

L Mansa v. Mst Ancho AIR 1923 All 541 relied on 876

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M Abdul Tawheed v The Patna High Court Bar Council AIR 1957 Pat 610 distinguished 511

Madho Prasad v District Board Lucknow Civil Miscellaneous Writ no 20 of 1955 decided on 15th September 1955 relied on 502

Mahabir Prasad v H N Palmer AIR 1952 All 605 relied on 95 506

Mahabir Prasad v The Magistrate Kanpur 1955 ALJ 25 disapproved 108 109
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Maharani of Burdwan v Krishna Kumari Dis (1897) I L R 24 Cal 365 372 relied on 576

Majiuddin Khan v Junki Billabh Dutt (1953) I L R 1 Cal 488 referred to 413
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Mangil Ganda v Emperor AIR 1925 Nag 37 relied on

Manindra Nath Pal v Municipal Commissioner of Bhagalpur Municipality AIR 1958 Cal 291 referred to 501

Mani Ram v Bhagwat Swarup 1949 ALJ 40 relied on 117

Mannu Lal v Chakradhar Hans 1952 ALJ 278 disapproved 411 416
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Mitan v King Emperor (1910) 7 ALJ 1143 distinguished 129

M C Inerney v The Secretary of State for India (1911) I L R 38 Cal 787 relied on 577

M C I Muthiah v Commissioner of Income tax Madras 29 I T R 380 referred to 469 488

Mehnga Ram v Labour Appellate Tribunal of India at Lucknow I L R [1957] 1 All 109 referred to 211

Messrs Charan Das and Sons v Messrs Harbhajan Singh Hardit Singh AIR 1958 Punj 109 adopted 560 599

Messrs Upper Doab Sugar Mills Ltd v The Labour Commissioner Civil Miscellaneous Writ no 664 of 1958 decided on 16th September 1958 dissented from 117

Mohammad Yunus v The District Magistrate Kanpur Civil Miscellaneous Writ no 38 of 1956 decided on 4th December 1956 adopted 412

Mulugu Lakshminarayanchayulu v Mansetti Ratnam AIR 1949 Mad 739 explained 251 253

M P Sharma v Satish Chandra AIR 1954 SC 300 applied 134 135

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Mukhtar Singh Chaudhri v The State of U P 1956 A L J 878 relied on 480 481 482

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Nabhakiya Byack v Shiam Sunder Haldar A I R 1953 S C 148 referred to 493 494

Narain Das v Mst Radha Kuar A I R 1939 All 47 referred to 847

Narayan Kisan v Bhaurao Sankharam A I R 1956 Nag 124 referred to 327

Narain Rao v The State of Andhra Pradesh 1958 S C R 283 referred to 681

Narayan Sonaji v Shesharao Bahoba A I R 1948 Nag 238 relied on 31

National Iron & Steel Co Ltd v Monorama Dassi A I R 1953 Cal 145 considered 870

National Telephone Co v Barker L R [1893] 2 Ch 186 203 relied on 105

New York Trust Co v Eisner 256 U S 345 65 L Ed 963 referred to 81

Nias Ahmad Khan v Parshottam Chandra A I R 1931 All 154 relied on 378

Nihal Singh v Ganesh Das Ram Gopal 1956 O W N 1158 referred to 647

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Official Trustee of Bengal v Benode Behari Ghose Mal (1924) I L R 51 Cal 945 adopted 184

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Pandurang Kashinath More v Union of India (1958) 60 Bom L R 342 disapproved 65 66

Parmadhdhan Singh v Gaya Prasad 1957 A L J 628 dissented from 70 71

Patton v State of Mississippi 332 U S 463 92 L Ed 78 referred to 89 91

Pestonji Framji Misri v Framji Rejanji Billimoria (1910) 8 I C 180 relied on 50

Pethu Reddiar v Rajambu Ammal A I R 1948 P C 97 relied on 301 302

Pohap Singh v Emperor Criminal Revision Application no 17 of 1912 decided on 14th May 1912 referred to 250 251

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Ponnuswami v Returning Officer 1952 S C R 218 distinguished 445 446 448

Poonan Singh v The Additional Commissioner Agra 1957 A L J 195 followed 185

Pramesh Chandra Gupta v The Registrar High Court of Judicature Allahabad I L R [1955] 1 All 243 distinguished 540

Prem Narain Tayal v Girish Chandra Khare 1954 A L J 62 relied on 97 100

Pretty v Solly (1859) 26 Beav 606 610 referred to 48

Province of Madras v R B Poddar A I R 1949 Mad 214 relied on 578 579

Pubi Kuri Kotayya v King Emperor (1946) L R 74 I A 65 applied 660

Pukhai v Emperor A I R 1948 Oudh 187 referred to 191

Punjab State v Bhagat Singh A I R 1955 Punj 118 referred to 80

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Queen v Sabid Ali (1873) 20 W R 5 (Crl) referred to 20 21 22

Queen Empress v Tammal (1899) I L R 21 All 122 distinguished 282 289

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Radha Kishan v Ram Nagar Co operative Society A I R 1951 All 341 referred to 549 550

Raghubir Singh v Court of Wards Ajmer A I R 1953 S C 373 distinguished 482

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Raja Syed Mohammad Sadat Ali Khan v State of U P I L R [1959] 2 All 149 relied on 397

Rajendra Mills Ltd v Income tax Officer (1957) 32 I T R 439 distinguished 525

Raj Kishore v State of Uttar Pradesh A I R 1954 All 343 dissented from 41 42 43 45 81 86

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Rallia Ram Raj Kumar Firm v Union of India AIR 1952 Punj 340 relied on 533 534

Ram Autar v Rent Control and Eviction Officer Jhansi ILR [1959] 1 All 284 explained 102

Ram Chandra v The District Magistrate of Aligarh 1952 ALJ 114 relied on 106

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Ram Hari v Nilomani Das AIR 1952 Cal 184 relied on 50

Ramjee Modak v Durga Charan AIR 1929 Cal 830 relied on 387

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Ram Narain Tewari v Ram Chandra Sharma 1953 ALJ 88 relied on 97

Ram Prasad Narayan Sahi v The State of Bihar AIR 1953 SC 215 relied upon 468

Ram Pratap v Panna Lal 1956 ALJ 787 relied on 293 294 295

Ram Singh v Sub Divisional Officer Chunar 1958 ALJ 209 questioned 317 318

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Roddy v Fitzgerald (1858) HLC 823 referred to 300 301

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Sabhapat Singh v Abdul Ghaffur (1897) ILR 24 Cal 170 referred to 444

Sakhu v The State AIR 1951 Nag 349 referred to 636

Sandall v Franklin (1874) LR 10 CP 377 relied on 569

Sangram Singh v Election Tribunal Kotah AIR 1953 SC 423 relied on 282 283

Satish Chandra Anand v Union of India AIR 1953 SC 250 referred to 52

Satya Narain Transport Co Ltd v Secretary State Transport Authority West Bengal AIR 1957 Cal 638 referred to 215

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Secretary of State for India represented by the Collector of South Arcot v Musk & Co I L R (1940) Mad 599 relied on 552 553

Secretary of State v Musk & Co A I R 1940 P C 105 followed 107

Secretary of State for India in Council v Roy Jamindranath Chaudhry A I R 1924 P C 175 followed 106

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Shah Chaturbhuj v Shah Manji Ram 1938 O W N 763 referred to 647

Shah & Co v Ishar Singh Kirpal Singh and Co A I R 1954 Cal 164 referred to 241

Sia Mulchand & Co Ltd v Jawahar Mills Ltd Salem A I R 1955 S C 98 referred to 241 242

Shankar Lal Patwari v Hira Lal Murarka A I R 1950 P C 80 relied on 351 352

Sheo Balak v Sarabjit Singh A I R 1952 All 516 considered 848

Sheopujan Rai v Bishunath Rai A I R 1950 All 706 considered 280

Shiam Lal J Dewan v Official Liquidator of U P Oil Mills Co Ltd A I R 1955 All 789 referred to 241

Shib Charan Lal v Raghunath (1885) I L R 12 All 174 195 relied on 351

Shree Meenakshi Mills Ltd Madurai v Sri A V Viswanatha Sastri (1954) 26 I T R 718 explained 469 470 471 472 487 488 519

Shrimati Buddey v Shrimati Mahadevi 1954 A L J 95 relied on 293

Shubhkara Sekaria v Commissioner of Income tax U P C P and Berar 18 I T R 775 applied 168

Simbhooli Industries Messrs v State of U P 1958 A L J 863 dissented from 147

State v Phoolchand A I R 1950 M B 50 dissented from 199

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State of Madhya Pradesh v G C Mandawar A I R 1954 S C 493 followed 54

State of Madras v Smt Champakam Dorai Rajan A I R 1951 S C 226 relied on 51

State of Punjab v Ajaib Singh A I R 1953 S C 10 relied on 55

State of U P v Manbodhan Lal Srivastava A I R 1957 S C 912 relied on 101

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State of U P v Mohammad Nooh AIR 1958 SC 86 referred to 331

State of U P v Mukhtar Singh AIR 1957 All 302 distinguished 442 443

Subodh Kumar Bose v Commissioner of Krishnagar Municipality AIR 1956 Cal 193 referred to 284

Sudhra Ramji v Mahammad Issak AIR 1956 Bom 236 considered 279

Subramania Iyer v King Emperor (1901) LR 28 IA 257 referred to 590

Sudarsan Barhambhat v Emperor AIR 1947 Pat 64 distinguished 129

Sukhanandan Thakur v State of Behar AIR 1957 Pat 617 disapproved 54 55
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Thawardas Pherumal v Union of India AIR 1955 SC 468 relied on 574

Theberge v Laudry LR [1876] 2 AC 102 referred to 449

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The Central Finance and Housing Co Ltd. v Messrs. The British Transport, Co 1953 A L J 638 relied on 306 307

Thin Yick v Secretary of State for India in Council I L R. [1939] 1 Cal 257 relied on 551

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Union of India v Chheda Lal Ram Autar I L R. [1958] 2 All 72 relied on 124

Union of India v Firm Kiroo Mal Nawal Kishore A I R 1952 Punj 425 referred to 242

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U Shin v Maung Tha Gywe (1940) I L R. 8 Rang 538 relied on 28

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Venkatagiri Ayyangar v Hindu Religious Endowments Board, Madras (1948 49) L R 76 I A 67 relied on 31 32

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CRIMINAL REVISION

Before Mr Justice Mulla and Mr Justice Nigam *

1958

August 28

LAKSHMI NARAIN

v

STATE

Criminal Trial—*Criminal Prisoner—Hunger strike—Prisons Act 1894 ss 3 (2) and 52 and Jail Manual Chapter XXVIII, para 742 and Chapter XXX, para 806 scope of—*

Held that the act of going on hunger strike is an offence under para 742 of the Jail Manual and is punishable under s 52 of the Prisons Act provided the accused was a prisoner under s 3 (2) of the Prisons Act

Where the accused repeatedly refused to take food to seek a redress for his supposed grievances it must be held that the accused was on hunger strike and his case falls under para 742 of the Jail Manual

(ii) Para 742 of the Jail Manual does not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to Jail Hunger strike has been made no offence by the State and the act of hunger strike *per se* does not constitute an offence

Where the accused was committed to jail on the basis of an order issued by a proper authority and not because he went on hunger strike but while in jail he was on hunger strike then his case falls under s 52 of the Prisons Act for he committed a breach of the rules framed for maintaining discipline in Jails

(iii) Also that every fresh act of refusal to take food at the time when meals are given to prisoners in Jail would constitute a fresh offence

Criminal Revision No 74 of 1958 against an order of B N Chaudhri Sessions Judge, Lucknow dated 13th January 1958

The facts appear in the judgment

H N Misra for the applicant

The Additional Government Advocate (*P N Chaudhari*) for the State

The judgment of the Court was delivered by—

MULLA, J —This is a criminal revision filed by Head Constable Lakshmi Narain who belonged to the armed police He was sent to jail on the 4th of November 1957 It seems to us that the applicant along with

*Sitting at Lucknow

1959

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Mulla, J.

some other police men wanted to have a redress of certain grievances and the applicant and his companions went on hunger strike on the 1st November 1957 while they were still outside When the applicant came to the jail he continued his hunger strike and in spite of repeated attempts made by the jail authorities to persuade him to take food he refused to do so The jail authorities warned the applicant repeatedly that this is a major offence against jail discipline and the Superintendent of Jail also punished him on some occasions in order to persuade him to give up his hunger strike These attempts however, proved unsuccessful and finally the Superintendent of Jail felt that he could not adequately punish the applicant for this continuous breach of jail rules and discipline and so he submitted a report to the Inspector General of Prisons The Inspector General of Prisons after perusing the report came to the conclusion that it was a fit case in which the applicant should be prosecuted under section 52 of the Prisons Act A complaint was accordingly filed and after a trial before a Magistrate the applicant was convicted under section 52 of the Prisons Act The sentence awarded to the applicant was six months rigorous imprisonment

After his conviction the applicant went up in appeal but his appeal was dismissed He then filed an application of revision before this Court which came before one of us and as it was considered that some important aspects of interpreting the relevant law were involved it was ordered to be placed before a Divisional Bench of this Court It has come before us to day in pursuance of that reference

The provision for prosecuting a prisoner under section 52 of the Prisons Act if he goes on hunger strike, is made in paragraph 742 of the Jail Manual under Chapter XXVIII Paragraph 742 runs as follows

> Prisoners who go on hunger strike shall be warned that no request for the redress of any of their alleged grievances shall be considered so long as the strike continues that hunger strike is

a major jail offence that a mass hunger strike amounts to mutiny and that hunger strikers are liable to be punished either departmentally or by prosecution under section 52 of the Prisons Act, 1894 (IX of 1894) under which they may be sentenced to imprisonment which may extend to one year

A hunger striker should not ordinarily be prosecuted under the Prisons Act without the previous sanction of the Inspector General

There is another paragraph in the Jail Manual the relevant part of which we quote at this stage That paragraph is 806 in Chapter XXX of the Jail Manual

In addition to acts declared to be Prison offences under section 45 of the Prisons Act 1894 (IX of 1894) the following acts are forbidden and every prisoner who wilfully commits any of the following acts shall be deemed to have wilfully disobeyed the regulations of the prison and to have committed a prison offence within the meaning of sub section (1) of the above section of the acts (17) refusing to eat food or the food prescribed by the prison diet scale

In view of the two paragraphs quoted above it cannot be doubted that in the interests of maintaining discipline in jails the refusal to take food by a prisoner has been made an offence One can understand why it has been made an offence for if prisoners refused to take food it is bound to adversely affect the discipline which has to be maintained in jails and jails are not places where people can have their own choice of food or their own choice in other matters A prisoner on hunger strike will attract sympathy from other prisoners and this may lead to acts of indiscipline being committed on a mass scale and may even lead to mutiny This obviously cannot be permitted We are therefore satisfied that the act of going on hunger strike is an offence within the meaning of paragraph 742 of the Jail Manual and it is punishable under section 52 of the Prisons Act

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Mulla, J.

There are, however, certain other questions which arise in determining the guilt of the applicant in this case. The first fact which should be proved in such cases is that the accused was a prisoner within the definition given under section 3 (2) of the Prisons Act. We are at the moment concerned only with a criminal prisoner and this phrase has been defined as follows:

> Criminal prisoner means any prisoner duly committed to custody under the writ, warrant or order of any court or authority exercising criminal jurisdiction or by order of a court martial.

The prosecution examined Sri Usmani, the Superintendent of Jail who deposed that the applicant was an under trial who was admitted to jail on the 4th of November 1957. This by itself would not have been sufficient to prove that the applicant was a criminal prisoner. In the definition cited above it is clearly mentioned that only that person can be called a criminal prisoner who is admitted to jail on the warrant or order of any court or authority. Obviously if the applicant was admitted to jail on the basis of such a warrant or order it existed in the papers with the jail authorities and it should have been produced by the prosecution to prove that the applicant was a prisoner. This warrant of remand to jail custody issued by a competent Magistrate was not exhibited in this case. Under the circumstances it would have been difficult to accept the oral statement of Sri Usmani regarding the contents of a document which was within his possession and which was not placed before the court. It is not one of those cases where primary evidence could have been dispensed with and secondary evidence was permissible. We however find that a question was put to the applicant when he was examined under section 342 Criminal Procedure Code and he admitted that he was an under trial prisoner who was admitted to jail on the 4th November 1957. We think that on the basis of this admission made by the applicant we can safely accept that the applicant was a prisoner within the meaning of paragraph 742 of the Jail Manual.

The next question to be determined is whether the applicant was on hunger strike as alleged by the prosecution or he merely refused to take food It is only when a prisoner goes on hunger strike that he can be prosecuted under section 52 of the Prisons Act, and mere refusal to take food even on repeated occasions will not by itself turn this refusal into a hunger strike It is only when this refusal is meant to be used as a weapon for seeking redress of grievances that it assumes the character of hunger strike The prosecution produced no evidence on this point but here again the applicant when questioned under section 342 Cr P C stated that he had given up taking food since the Ist of November 1957 and he had done so in order that certain grievances should be redressed In Webster's New International Dictionary, Volume 1, Second Edition hunger strike has been given the following meaning

> The action of one especially a prisoner, who refuses to eat anything or enough to sustain life so as to obtain compliance with his demands as for release

We are satisfied that on his own admission the applicant repeatedly refused to take food not because of some other reason but because he wanted to seek a redress for his supposed grievances These grievances need not be related necessarily to the treatment meted out to a prisoner in jail or to a period of time subsequent to his admission in jail The refusal of the applicant to take food on the 4th November 1957 and the 5th of November 1957 in jail was therefore an act of hunger strike and not merely an act of refusal to take food We are therefore satisfied that the applicant was on hunger strike and so his case falls within the orbit of paragraph 742 quoted above

The last question to be decided is whether the applicant could be prosecuted under section 52 of the Prisons Act because he had continued to remain on hunger strike The learned counsel for the applicant contends that the words used in paragraph 742 indicate that the

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prisoners who go on hunger strike can be prosecuted but not those prisoners who were already on hunger strike before they were admitted to jail and merely continued to remain on hunger strike. We have considered this contention and we have come to the conclusion that in the context the words "go on hunger strike" include "remaining on hunger strike". It was conceded by the counsel that hunger strike is a continuing act and therefore, every fresh act of refusal to take food at the time when food was offered to him would amount to a fresh act of hunger strike. This would amount to his going on hunger strike on that occasion. Every one knows that at least two meals are provided to a prisoner daily and therefore there would be at least two times every day when the offender can be said to have gone on hunger strike. The words of paragraph 742 do not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to jail. It is open to a person to go on hunger strike for the State has not made it an offence. It was open to the State to declare an act of hunger strike as an offence within the meaning of section 309 Indian Penal Code but the State has not elected to do so. It can, therefore, safely be held that the act of hunger strike *per se* does not constitute an offence. If a person is removed to jail merely because he has gone on hunger strike and then after placing him inside the jail the jail authorities prosecute him under section 52 of the Prisons Act obviously such a prosecution would be illegal and a conviction cannot be maintained in such circumstances. In such a case the accused would not be a prisoner within the meaning of section 3 (2) of the Prisons Act. It is true that in common parlance the term "prisoner" is applied to any one who is deprived of his liberty and detained in prison but for the purpose of the application of the provisions of the Prisons Act the prosecution must prove that this detention was legal as it was sanctioned by a competent authority on the basis of an offence charged against the accused and it was not in violation of Article 20 (2) of the Constitution of India. The executive authority cannot be given the

op ion of punishing a citizen for going on hunger strike by shutting him up in jail and turning him into a pri soner But for the admission of the applicant himself we would not have accepted that he was a prisoner The applicant did not challenge the validity of his de tention in prison and so we have to accept that he was legally detained But where a person goes on hunger strike and he has also committed some offence on the basis of which he was rightly sent on a remand warrant to jail custody then it cannot be pleaded by him that because he had started hunger strike earlier he can ignore the rules of jail discipline The test is whether the offender was brought to jail because he went on hunger strike or because he committed some offence If his entry into jail is on the basis of some offence then this plea is not open to him that as he did not start the hunger strike in jail so he can continue to be on hunger strike and thus commit a breach of the jail discipline rules What is permitted to a citizen is not permitted to a prisoner A citizen is entitled to lead his own life outside the jail so long as he does not commit any offence but a prisoner has to submit to jail rules in the interests of discipline The prisoners cannot be permitted to turn a jail into a hospital or a forum of agitation whether political or otherwise In this case we are satisfied that the applicant was admitted to jail on the basis of an order issued by a proper authority and not because he went on hunger strike His case therefore falls under section 52 of the Prisons Act for he committed a breach of the rules framed for maintaining discipline in jails

Another contention advanced by the counsel for the applicant was that in the report submitted by the Superintendent of Jail to the Inspector General of Prisons seeking his sanction he has mentioned that repeated warnings and jail punishments were given to the applicant before sanction was sought The counsel has contend ed that under paragraph 742 it is not open to the jail authorities to punish the applicant twice first by inflict ing those punishments which could be awarded to the applicant by the jail authorities and then by seeking a

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sanction and prosecuting him under section 52 of the Prisons Act. In our opinion this contention is also not maintainable. We have held above that every fresh act of refusal to take food at the time when meals are given to prisoners in jail would constitute a fresh offence. It seems to us that the jail authorities first tried to bring the applicant to reason by awarding only jail punishments but he persisted in his hunger strike and committed a fresh offence repeatedly. No punishment was awarded to the applicant for these fresh offences for the jail authorities came to the conclusion that they could adequately punish him. It was then that they sought the sanction of the Inspector General of Prisons for his prosecution. We are, therefore, of the opinion that the applicant is not being punished twice for the same offence as contended by his counsel.

The trial court sentenced the applicant to six months rigorous imprisonment. This in our opinion, was an extremely severe sentence which was not justified at all but we find that the applicant has undergone this punishment and so we cannot give him any relief by reducing the sentence awarded to him. No bail application was presented on his behalf either before the appellate court or before this Court.

This application of revision is therefore, dismissed.

Application dismissed.

APPELLATE CIVIL

*Before Mr Justice Tandon**

C P MEHRA (DEFENDANT)

v

SRIMATI K K MEHRA (PLAINTIFF)

1958

September 16

Cross-objection—*Appeal dismissed for non payment of court fees—C P C 1908 Order XLI rule 22 sub rule 4 scope of—Dismissal for default meaning of*

Held that Order XLI rule 22 sub rule 4 C P C provides for those cases only where an appeal is withdrawn or dismissed for default Rejection of an appeal for non payment of court fee is not a dismissal for default of the appeal and consequently a cross-objection cannot be heard and determined after the dismissal of such an appeal

Avadh Narain Singh v *Badri Prasad Singh* (1)
U Shin v *Maung Tha Gyaw* (2)

Kashiram Sonu Choudhri v *Rangial Motilalshet Marwadi* (3) relied on

(*Pujari*) *Ayalu Reddi* v (*Pujari*) *Venkata Reddi* (4) dissented from

First Appeal no 24 of 1952 from a decree of Desh Deepak Civil Judge of Lucknow dated 18th March, 1952

The facts appear in the judgment

P N Mathur for the appellant

K H Rizvi, D N Bhattacharji and *S N Bhattacharji* for the respondent

TANDON, J —In this case the office pointed out on 14th July 1958 that there was deficiency in court fee paid on the memorandum of appeal to the extent of Rs 512 8 The deficiency report was made earlier because on 1st April 1958 the appellant was allowed two months time to make good the deficiency The appellant failed to deposit the necessary deficiency and proposed at one time to pursue the appeal in *forma pauperis* But on the last hearing this is on the 1st

Sitting at Lucknow

(1) 1943 A W R (C C) 159
(2) (1930) I L R 8 Rang 328
(3) A I R 1941 Bom 242
(4) A I R 1931 Mad 133

1958

C P MISHRA
v
SHRIMATI
K. K MISHRA

Tandon J

September 1958 his learned counsel informed that his client had decided not to deposit the court fee nor was he prepared to pursue his suggestion to have the appeal admitted in *forma pauperis* Hence since the necessary deficiency in the court fee has not been deposited, the memorandum of appeal has to be rejected and I direct accordingly The appellant will nevertheless pay the expenses incurred by the respondent in the appeal

After the above appeal had been filed the respondent filed a cross objection to the decree appealed against under Order XLI, rule 22 The question has accordingly arisen as to whether the cross objection also has to be dismissed, or can the same be continued despite the rejection of the appeal Order XLI, rule 22 has in sub rule (4) made provision that where any memorandum of objection has been filed under that rule and the original appeal is withdrawn or dismissed for default the objection may nevertheless be heard and determined after such notice to the other party as the court thinks fit

Relying on the above provision the respondent has urged that the cross objection will still need to be heard and determined because according to him the rejection of the appeal for non payment of court fee is in effect its dismissal for default Sub-rule (4) has doubtless provided that notwithstanding the dismissal for default of an appeal the cross objection can be heard and determined by the court after notice to the other party There is no controversy also that the ordinary rule is that a cross objection which owes its existence to the appeal urged by the appellant, falls with the termination of the appeal except as provided in the above sub rule The question which will therefore arise is whether rejection of an appeal for non payment of the necessary court fee is dismissal for default of the appeal

The respondent has in support relied on *(Pujari) Ayilu Reddi* v *(Pujari) Venkata Reddi* (1) in which the words dismissed for default occurring in sub rule (4) were given an extended meaning and held to include

(1) A I R 1951 Mad 133

the case of non prosecution of an appeal by not paying the deficit court fee asked to be paid by the court In that case the memorandum of appeal was found to be deficiently stamped Accordingly the District Judge asked the appellant to make good the deficiency The appellant did not do so and ultimately the District Judge rejected the appeal and also dismissed the cross objection which had been filed before him On appeal the High Court held that the non payment by the appellant of the court fee was tantamount to non performance of an act necessary for the further progress of the appeal and the consequent rejection of the appeal was really its dismissal for default

This case no doubt supported the respondent s contention Sub rule (4) of Order XLI rule 22 reads as follows

> (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit

The words used are is withdrawn or is dismissed for default Obviously the rejection of an appeal for non payment of court fee cannot be said to be withdrawal of the appeal Unless the expression dismissed for default can be said to include the rejection of an appeal for non payment of court fee the respondent cannot benefit by the sub rule There is nothing either in sub rule (4) itself or in any other part of rule 22 to justify the giving of an extended meaning to the words dismissed for default so that it may include the case of rejection of an appeal also This has not been contested by the learned counsel for the respondent also who has however contended that the non performance by an appellant of an act required to be done by him is a default by him hence the termination of an appeal in those circumstances is actually its dismissal for default,

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the terminology employed by the Civil Procedure Code in describing the particular order whether as rejection of the appeal or as dismissal for default is of no significance The Code has as need hardly be pointed out used two different expressions for indicating the type of order the court shall make in particular circumstances because something required to be done by an appellant has not been done by him These are reject an appeal or dismiss it for default for example see Order XLI rules 3 and 10 and Order XLI rules 17 and 18 There does not therefore appear any justification why if the legislature wanted that the words dismissal for default should include the case of rejection also if it should have omitted to make that provision When different words are employed for describing the results in any set of circumstances the usual rule of interpretation is unless a contrary intention is necessarily implied that a different effect is intended in each case Thus in using in rule 22 (4) the words dismissed for default, the Legislature must be presumed to have provided for those cases only which have been so described in the Code With due respect I am unable to agree with the view held by the Madras High Court in *Ayilu Reddi's* case (1) referred to above

The appellant invited reference to the case of *Avadh Narain Singh* v *Badri Prasad Singh* (2) decided by the late Chief Court of Avadh in which the Madras decision was not followed This was a two Judge decision in which the question, as the one here was exhaustively examined after reviewing the case law from the various courts The reasons which persuaded the learned Judges in rejecting the view held in *Ayilu Reddi's* case (1) briefly were that the provision in rule 22 (4) of Order XLI which was in the nature of an exception to the general rule has to be construed strictly and not extended beyond its obvious meaning And since the words used are dismissed for default the exception will benefit those cases only which have been thus branded by the Code Reference may be made to two cases viz,

(1) A I R 1951 Mad 133 (2) 1943 A W R 159

U Shin v *Maung Tha Gywe* (1) and *Kashiram Sonu Chaudhari* v *Rangilal Motilalshet Marwadi* (2) relied upon in the above decision In the latter case the learned CHIEF JUSTICE of the Bombay High Court observed

> In my opinion, it is quite clear that if an appeal is rejected for non payment of court fee cross objections must fail with the appeal Sub rule (4) of rule 22 provides that when an appeal is withdrawn or dismissed for default cross objections may be proceeded with but where an appeal is rejected it cannot in my opinion, be said to be withdrawn or dismissed for default

I entirely agree with the view expressed in the aforesaid three cases Sub rule (4) has clearly provided for those cases only where an appeal is withdrawn or dismissed for default Rejection of an appeal for non payment of court fee is not dismissal for default of the appeal The respondent cannot therefore successfully urge that the cross objection has notwithstanding the rejection of the appeal to be heard and determined on merits It too must be rejected and I order accordingly

Cross objection rejected

SUPREME COURT
APPELLATE CRIMINAL

Before Mr Justice Imam Mr Justice Das and Mr Justice Kapur

MIZAJI AND ANOTHER
v
STATE OF UTTAR PRADESH

1958
December 18

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Indian Penal Code, 1860, *ss* 149 302—*Forcible possession—Murder—Common object of the unlawful assembly—Test—Weapons and conduct material—Section* 149 *two parts—Distinction between—*

By s 149 Indian Penal Code if an offence is committed by any member of an unlawful assembly in prosecution of the

(1) (1930) I L R 8 Rang 538 (2) A I R 1941 Bom 242

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common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who at the time of committing of that offence is a member of the same assembly is guilty of that offence Where the appellants went in a body armed with lethal weapons with the common object of taking forcible possession of land which was in possession of others at any cost and one of the appellants fired a pistol at the instance of another member of the unlawful assembly and killed the person in possession

Held that the offence of murder must be held to be immediately connected with or in direct prosecution of the common object of taking forcible possession by the unlawful assembly

Held further that the members at any rate must be held to know that the murder was likely to be committed to accomplish the common object

Consequently the case fell under s 149 Indian Penal Code and all the appellants were guilty of murder

Held further that s 149 Indian Penal Code is in two parts The first part of the section applies where the offence committed is not in direct prosecution of the common object i e is in direct prosecution of the common object of the assembly

The second part of the section applies where the offence committed is not in direct prosecution of the common object yet the offence was such as the members knew was likely to be committed in prosecution of the common object of the assembly

Queen v *Sabid Ali* (1) and *Chikkarange Gowda* v *State of Mysore* (2) referred to

Criminal Appeals nos 81 and 82 of 1958 from an order of the Allahabad High Court dated 28th February 1958 in Criminal Appeal no 1809 of 1957

The facts appear in the judgment

Jai Gopal Sethi Senior Advocate (*B C Misra* Advocate with him), for the appellants

G C Mathur and *C P Lal* Advocates for the respondent

The following judgment of the Court was delivered by—

KAPUR, J —These are two appeals which arise out of the same judgment and order of the High Court at

(1) (1873) 20 W R (Cr) 5 (2) A I R 1956 S C 731

Allahabad and involve a common question of law Appellants Tej Singh and Mizaji are father and son, Subedar is a nephew of Tej Singh Machal is Tej Singh s cousin and Maiku was a servant of Tej Singh They were all convicted under section 302 read with section 149 of the Indian Penal Code and except Mizaji who was sentenced to death they were all sentenced to imprisonment for life They were also convicted of the offence of rioting and because Tej Singh and Mizaji were armed with a spear and a pistol respectively, they were convicted under section 148 of the Indian Penal Code and sentenced to three years rigorous imprisonment and the rest who were armed with lathis were convicted under section 147 of the Indian Penal Code and sentenced to two years rigorous imprisonment All the sentences were to run concurrently but Mizaji s term of imprisonment was to come to an end after he is hanged Against this order of conviction the appellants took an appeal to the High Court and both their convictions and sentences were confirmed

The offence for which the appellants were convicted was committed on 27th July 1957 at about sunrise and the facts leading to the occurrence were that field no 1096 known as Sukhna field was recorded in the revenue papers in the name of Banwari who was recorded as in possession as tenant in chief Sometime in 1949 he mortgaged this plot of land to one Lakhan Singh In 1952 this field was shown as being under the cultivation of Rameshwar, the deceased and four other persons Ram Swarup who was the uncle of Rameshwar, Jailal his brother Sita Ram and Saddon The record does not show as to the title under which these persons were holding possession The mortgage was redeemed some time in 1953 The defence plea was that in the years 1954 1955 1956 possession was shown as that of Banwari But if there were any such entries they were corrected in 1956 and possession was shown in the revenue papers as that of Rameshwar and four others abovenamed These entries showing cultivating possession of the deceased and four others were continued in 1957 On

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18th April 1957 Banwari sold the field no 1096 to Tej Singh appellant who made an application for mutation in his favour but this was opposed by the deceased and four other persons whose names were shown as being in possession In the early hours of 27th July 1957 the five appellants came armed as above stated Mizaji's pistol is stated to have been in the fold (pucrn) of his *dhoti* A plough and plank known as *patela* and bullocks were also brought The disputed field had three portions, in one sugarcane crop was growing in the other Jowar had been sown and the rest had not been cultivated Maiku started ploughing the Jowar field and overturned the Jowar sown therein while Tej Singh with his spear kept watch Bateshwar P W 7 seeing what was happening gave information of this to Ram Swarup who accompanied by Rameshwar Jailal and Israel came to the Sukhna field but unarmed Ram Swarup inquired of Tej Singh as to why he was damaging his field and Tej Singh replied that he had purchased the field and therefore would do what he was doing which led to an altercation Thereupon the four persons cutting the sugarcane crop i e Mizaji Subedar Machal and Maiku came to the place where Tej Singh was and upon the instigation of Tej Singh Mizaji took out the pistol and fired which hit Rameshwar who fell down and died half an hour later The accused after Rameshwar fell down fled from the place Ram Swarup Jailal and Israel then went to the police station Nawabganj and Ram Sarup there made the first information report at about 7 30 a m in which all the five accused were named When the police searched for the accused they could not be found and proceedings were taken under sections 87 and 88 of the Code of Criminal Procedure but before any process was issued Subedar Tej Singh and Machal and Maiku appeared in court on 3rd August 1957 and Mizaji on 14th August 1957 and they were taken into custody

The prosecution relied upon the evidence of the eye witnesses and also of Bateshwar who carried the information to the party of complainant as to the coming of

Tej Singh and others The defence of the accused was a total denial of having participated in the occurrence and as a matter of fact suggested that Rameshwar was killed in a dacoity which took place at the house of Ram Sarup The learned Sessions Judge accepted the story of the prosecution and found Ram Sarup to be in possession of the field he also found that the appellants formed an unlawful assembly, the common object of which was to take forcible possession of the field and to meet every eventuality even to the extent of causing death if they are interfered with in their taking possession of the field , and it was in prosecution of the common object of that assembly that Mizaji had fired the pistol and therefore all were guilty of the offence of rioting and of the offence under section 302, read with section 149, Indian Penal Code The High Court on appeal held that the appellants were members of an unlawful assembly and had gone to the Sukhna field with the object of taking forcible possession and

> there is also no doubt that the accused had gone there fully prepared to meet any eventuality even to commit murder if it was necessary for the accomplishment of their common object of obtaining possession over the field There is also no doubt that considering the various weapons with which the accused had gone armed they must have known that there was likelihood of a murder being committed in prosecution of their common object'

The High Court also found that all the appellants had gone together to take forcible possession and were armed with different weapons and taking their relationship into consideration it was unlikely that they did not know that Mizaji was armed with a pistol and even if the common object of the assembly was not to commit the murder of Rameshwar or any other member of the party of the complainants there can be no doubt that accused fully knew, considering the nature of weapons with which they were armed, namely, pistol and *lathis*, that murder was likely to be committed in their attempt to take forcible possession over the disputed land The

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High Court further found that the accused had gone prepared if necessary to commit the murder in prosecution of their common object of taking forcible possession They accepted the testimony of Matadin and Hansram who stated that all the accused had asked Ram Swarup and his companions to go away, otherwise they would finish all of them and when they resisted Mizaji accused fired the pistol at them and thus in view of the nature of the weapons with which they had gone to the disputed piece of land, they knew that murder was likely to be committed in prosecution of their object Another finding given by the High Court was that the appellants wanted to forcibly dispossess the complainant and with that object in view they went to the disputed field to take forcible possession and that the complainant s party on coming to know of it went to the field and resisted Mizaji fired the pistol and thus caused the death of Rameshwar The High Court also held

> We are also of the opinion that the act of the accused was premeditated and well designed and that the accused considering the circumstances of the case and the weapons with which they were armed, knew that murder was likely to be committed in accomplishment of their common object

For the appellants it was contended that the High Court was not justified in drawing the inference that other members of the party of the appellants had knowledge of the existence the pistol There is no doubt that on the evidence the father, Tej Singh must have known that the son, Mizaji had a pistol And in the circumstances of this case the High Court cannot be said to have erroneously inferred as to the knowledge of the rest as to the possession of pistol by Mizaji

The question for decision is as to what was the common object of the unlawful assembly and whether the offence of murder was committed in prosecution of the common object or was such an offence as the members of the unlawful assembly knew was likely to be committed in prosecution of the common object It was argued on behalf of the appellants that the common object was to take forcible possession and that murder was committed neither in prosecution of the common object of the unlawful assembly nor was it such as the members of that assembly knew to be likely to be committed That the common object of the unlawful assembly was to take forcible possession of the Sukhna field cannot be doubted Can it be said in the circumstances of this case that in prosecution of the common object the members of the unlawful assembly were prepared to go to the extent of committing murder or they knew that it was likely to be committed? One of the members of the assembly Tej Singh was armed with a spear His son Mizaji was armed with a pistol and others were carrying lathis The extent to which the members of the unlawful assembly were prepared to go is indicated by the weapons carried by the appellants and by their conduct their collecting where Tej Singh was and also the language they used at the time towards the complainant s party The High Court has found that the appellants had gone perpared to commit murder if necessary in the prosecution of their common object of taking forcible possession of the land ', which is based on the testimony of Matadin and Hansraj who deposed that when the complainant s party arrived and objected to what the appellants were doing they, (the appellants), collected at once and asked Ram Swarup and his companions to go away otherwise they would finish all of them and when the latter refused to go away, the pistol was fired That finding would indicate the extent to which the appellants were prepared to go in the prosecution of their common object which was to take forcible possession of the Sukhna field The High Court also found that in any

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event the case fell under the second part of section 149, Indian Penal Code, in view of the weapons with which the members of the unlawful assembly were armed and their conduct which showed the extent to which they were prepared to go to accomplish their common object

Counsel for the appellants relied on *Queen* v. *Sabid Ali* (1), and argued that section 149 was inapplicable There the learned Judges constituting the Full Bench gave differing opinions as to the interpretation to be put on section 149, Indian Penal Code That was a case where the members of an unlawful assembly went to take forcible possession of a piece of land The view of the majority of the Judges was that finding unexpected opposition by one member of the party of the complainants and also finding that they were being overpowered by him, one of the members of the unlawful assembly, whose exact name of joining the unlawful assembly was not proved, fired a gun killing one of the occupants of the land who were resisting forcible dispossession It was also held that the act had not been done with a view to accomplish the common object of driving the complainants out of the land, but it was in consequence of an unexpected counter attack AINSLIE, J, was of the opinion that the common object of the assembly was not only to forcibly eject the occupants but to do so with show of force and that common object was compounded both of the use of the means and attainment of the end and that it extended to the committing of murder PHEAR, J, said that the offence committed must be immediately connected with that common object by virtue of the nature of the object The members of the unlawful assembly must be prepared and intend to accomplish that object at all costs The test was, did they intend to attain the common object by means of murder, if necessary? If events were of sudden origin, as the majority of the learned Judges held them to be in that case, then the responsibility was entirely personal In regard to the second part he was of the opinion that for its application it was necessary that members of the assembly

(1) (1872) 20 W R 5 (Cr)

must have been aware that it was likely that one of the members of the assembly would do an act which was likely to cause death COUCH, CHIEF JUSTICE, was of the opinion that firing was not in prosecution of the common object of the assembly and that there was not much difference between the first and the second part of section 149 He said

> At first there does not seem to be much difference between the two parts of the section and I think the cases which would be within the first, offences committed in prosecution of the common object, would be, generally, if not always within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object But I think there may be cases which would come within the second part and not within the first

JACKSON, J, held in the circumstances of that case that assembly did not intend to commit nor knew it likely that murder would be committed PONTIFEX, J, interpreted the section to mean that the offence committed must directly flow from the common object or it must so probably flow from the prosecution of the comoion object that each member might antecedently expect it to happen In the second part know meant to know that some members of the assembly had previous knowledge that murder was likely to be committed

This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object, it is enough if it is adopted by all the members and is shared by all of them In order that the case may fall under the first part, the offence committed must be connected immediately with the comu ion object of the unlawful assembly of which

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the accused were members Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed The expression 'know' does not mean a mere possibility, such as might or might not happen For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149 Similarly if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all There is a great deal to be said for the opinion of COUCH, CHIEF JUSTICE, in *Sabid Alis* case (1) *that* when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object That, however does not make the converse proposition true there may be cases which would come within the second part, but not within the first The distinction between the two parts of section 149, Indian Penal Code, cannot be ignored or obliterated In every case it would be an issue to be determined whether the offence committed falls within the first part of section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part

Counsel for the appellants also relied on *Chikkarange Gowda* v *State of Mysore* (2) In that case there were special circumstances which were sufficient to dispose of it The charge was a composite one mixing up common intention and common object under sections 34

(1) 18 W.R. 5 (Cr.) (2) A.I.R. 1956 S.C. 731

and 149 Indian Penal Code and this Court took the view that it really was one under section 149 Indian Penal Code The charge did not specify that three of the members had a separate common intention of killing the deceased different from that of the other members of the unlawful assembly The High Court held that the common object was merely to chastise the deceased and it did not hold that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object The person who was alleged to have caused the fatal injury was acquitted This Court held that on the findings of the High Court there was no liability under section 34 and further the charge did not give proper notice, nor a reasonable opportunity to those accused to meet that charge On these findings it was held that conviction under section 302 read with section 149, was not justified in law nor a conviction under section 34

It was next argued that the appellants went to take possession in the absence of the complainants who were in possession and therefore the common object was not to take forcible possession but to quietly take possession of land which the appellants believed was theirs by right In the first place there were proceedings in the Revenue Department going on about the land and the complainants were opposing the claim of the appellants and then when people go armed with lethal weapons to take possession of land which is in possession of others they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accomplish their common object would depend on their conduct as a whole

The finding of the High Court as we have pointed out was that the appellants had gone with the common object of getting forcible possession of the land They divided themselves into three parties, Maiku appellant was in the field where *juwar* was sown and he was ploughing it Mizaji Subedar and Machal were in the sugar field and cutting the crop Tej Singh was keeping watch When the party of the complainants on being

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told of what the appellants were doing came they protested to Tej Singh Thereupon, all the members of Tej Singh's party gathered at the place where Tej Singh was and asked the complainants to go away otherwise they would be finished, but they refused to go There upon Tej Singh asked Mizaji to fire at them and Mizaji fired the pistol which he was carrying in the fold of his *dhoti* as a result of which Rameshwar was injured fell down and died ½ hour later It was argued on behalf of the appellants that in these circumstances it cannot be said that the offence was committed in prosecution of the common object of the assembly which was clear from the fact that the party had divided itself into three parts and only Mizaji used his pistol and the other appellants did not use any weapon and just went away

Both the courts below have found that the pistol was fired by Mizaji and thus he was responsible for causing the death of Rameshwar which would be murder and also there is no doubt that Tej Singh would be guilty of abetment of that offence But the question is whether section 149 is applicable in this case and would cover the case of all the appellants This has to be concluded from the weapons carried and the conduct of the appellants Two of them were armed, one with a spear and the other with a pistol The rest were armed with lathis The evidence is that when the complainants party objected to what the appellants did, they all collected together and used threats towards the complainants' party telling them to go away otherwise they would be finished and this evidence was accepted by the High Court From this conduct it appears that members of the unlawful assembly were prepared to take forcible possession at any cost and the murder must be held to be immediately connected with the common object and therefore, the case falls under section 149, Indian Penal Code, and they are all guilty of murder This evidence of Hansram and Matadin which relates to a point of time immediately before the firing of the pistol shows that the members of the assembly at least knew that the offence of murder was likely to be committed to accomplish the common object of forcible possession

It was then contended that Mizaji did not want to fire the pistol and was hesitating to do so till he was asked by his father to fire and, therefore penalty of death should not have been imposed on him Mizaji carried the pistol from his house and was a member of the party which wanted to take forcible possession of the land which was in possession of the other party and about which proceedings were going on before the Revenue Officer He fully shared the common object of the unlawful assembly and must be taken to have carried the pistol in order to use it in the prosecution of the common object of the assembly and he did use it Merely because a son uses a pistol and causes the death of another at the instance of his father is no mitigating circumstance which the courts would take into consideration

In our opinion the courts below have rightly imposed the sentence of death on Mizaji Other appellants being equally guilty under section 149, Indian Penal Code, have been rightly sentenced to imprisonment for life

The appeals must, therefore, be dismissed

Appeal dismissed

CIVIL REVISION

*Before Mr Justice Mukerji and Mr Justice Nigam**

SHEO KUMAR DWIVEDI AND OTHERS (DEFENDANTS)

v

SHRI THAKURJI MAHARAJ BIRAJMAN (PLAINTIFF)

1959
January 22

Withdrawal of Suit—*Court granting permission—Suit depending on an attesting witness to a will—Failure of justice—Civil Procedure Code 1908 s 115 scope of*

The plaintiff filed a suit for declaration of title to some property and the success of the suit depended upon the proof of a will but one of the attesting witnesses to the will was won over by the defendants

*Sitting at Lucknow

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The plaintiff believed that he may prevail upon the witness to be honest and truthful and thus later on he may succeed in proving the will by the production of this witness The plaintiff therefore applied for the withdrawal of the suit with liberty to bring a fresh suit on the same cause of action and the court permitted the said withdrawal of the suit A revision was filed against the above order

Held, (i) that the plaintiff was faced with an incapacity of producing such evidence as the law required under the statutory provisions of s 68 of the Indian Evidence Act and the defect was in the nature of a formal defect

(ii) That the powers of the High Court in revision are not available for correction of errors of law however gross these errors may be and whatever may be the result of these errors on the merits of the case

Narayan Sonaji v *Sheshrao Bithoba* (1)

Keshardeo Chamaria v *Radha Kishan* (2)

N S Venkatagiri Ayyangar v *Hindu Religious Endowments Board, Madras* (3) relied on

(iii) Further that the exercise of revisional powers by this Court are discretionary and the High Court can refuse to exercise that discretion unless there was likely to be some substantial failure of justice and in this case it cannot be said that unless the order of the court below is set aside there was any failure of justice much less a substantial failure thereof and unless the plaintiff is given permission to withdraw his suit with liberty to bring a fresh suit later on it was he that was likely to suffer injustice and not the defendants

Civil Revision No 117 of 1952 against the order passed by Q U Siddiqi Munsif South, Lucknow dated the 24th May, 1952

The facts appear in the judgment

N Banerji for applicants

Babu Lal Srivastava for the opposite party

The judgment of the Court was delivered by—

MUKERJI, J —This is an application in revision by the defendants against the order of a Munsif of Lucknow granting permission to the plaintiff to withdraw his suit and further to file a fresh suit on the same cause of action

1 A I R 1948 Nag 250 2 A I R 1953 S C 23
3 (1948-49) L R 76 I A 67

This application in revision originally came up before a learned Single Judge who thought it desirable because a large number of decisions had been cited before him on the question whether or not a revision lay, to refer it to a Bench and that is how this revision has now been listed before us.

The suit out of which this revision has arisen was filed by Shri Thakurji Maharaj Birajman in the house of late Pandit Brahmadin through his Shibait and Sarbarakar Pandit Hari Shanker. The suit apparently was for a declaration of title to some property. It also is clear at any rate from the referring order that the success of the plaintiff depended upon the plaintiff successfully proving the existence of a certain will in his favour. The plaintiff found himself in a curious situation when he discovered that his witnesses particularly those who were the attesting witnesses of the will had been won over by the defendants. The plaintiff therefore applied to the court for permission to withdraw the suit with liberty to file a fresh suit later on the same cause of action. The plaintiff apparently took this precaution because he may be optimistically believed that he may at a later date succeed in prevailing upon the witnesses to be honest and truthful and thus support his title which depended upon the formal proof of the will. The court below namely the Munsif, under the aforementioned circumstances permitted the withdrawal of the suit as we have already said. A revision was filed to this Court and Mr. *Banerji*, the learned counsel for the applicants has strenuously contended that the learned Munsif had no jurisdiction to make the order that he has in this particular case. Mr. *Banerji's* arguments were laid out on a very wide canvass and during the course of his arguments he discussed all the cases which were decided by the various High Courts, the Privy Council and also by the Supreme Court which indicated the ambit of the power which a High Court exercised under section 115 of the Code of Civil Procedure.

The argument of Mr. *Banerji* amounted to his contending that a court could only allow the withdrawal of

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Mukerji, J.

a suit with permission to bring a fresh one on the same cause of action if and only if, it fell within the four corners of Order XXII rule 1 of the Code of Civil Procedure He further contended that any error committed by the court below in deciding whether or not in a particular set of circumstances on which the plaintiff applied for the withdrawal of a suit with permission to bring a fresh one he could be permitted to do so was an error of jurisdiction The way Mr *Banerji* tied up this error if we may put it that way, to the question of jurisdiction was by saying that the court could only have jurisdiction to allow the plaintiff to withdraw the suit with permission to bring a fresh suit if that court, without committing any error whatever in its interpretation of either Order XXIII, rule 1 or in regard to the facts and circumstances, permitted it, otherwise every error according to him would be an error of jurisdiction

Mr *Banerji*, in the main, relied on the decision of the Bombay High Court in *Tarachand Bapuchand* v *Gaibhaji Ahmad Bhagwan* (1) where a learned Single Judge of that Court held that under circumstances to which that learned Judge referred to in his decision, the order which the court below in that case made permitting the withdrawal of the suit, was unjustified since the learned Judge felt that the view of the court below that there was a formal defect was an erroneous view It is trite proposition that each case is authority for itself and no more , unless a case lays down a broad proposition of law, it cannot have even a persuasive value *Tarachand Bapuchand's case* (1) was decided on its own facts and it is pertinent to notice that even while allowing the application in revision the learned Judge left it open to the plaintiff to have the defect, which apparently even the learned Judge found there was in the suit, corrected by a proper application Whether under the circumstances of that case the error was one of form or not need not be considered by us at all for in the case before us the circumstances with which we are concerned in order to determine whether

(1) A I R 1956 Bom 632

or not the defect which faced the plaintiff amounted to what rule 1 of Order XXIII of the Code of Civil Procedure calls formal defect are different Therefore, in our view the Bombay decision could lend little support if any, to that contention of Mr Banerji on which he could succeed

The relevant portion of Order XXIII, rule 1 of the Code of Civil Procedure is in these words

> (1) At any time after the institution of a suit the plaintiff may as against all or any of the defendants, withdraw his suit or abandon part of his claim
>
> (2) Where the court is satisfied--
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may

It has been held, and it may be taken now as the proper rule of law that what are other sufficient grounds in rule 1 (2) (b) has to be *ejusdem generis* of what is provided in (2) (a) The learned Judge who made the reference in this case was not shown the Full Bench decision of this Court reported in *Abdul Ghafoor* v *Abdul Rahman* (1), where it was held that the words other sufficient grounds in rule 1 (2) (b) of Order XXIII of the Code cover grounds analogous to those mentioned in rule 1 (2) (a)

The question that we have to determine, therefore, is first whether there was a defect of the nature contemplated by Order XXIII, rule 1 of the Code of Civil Procedure or not The court below thought that there was, and on an examination of the circumstances to which we have already referred in the earlier portion of this judgment of ours, we cannot say that the court below was wrong The plaintiff could succeed only if he could furnish proof of the will in his favour The proof of the will not only depended upon the proof of the fact

(1) A I R 1951 All 845

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that a certain individual had executed the will and that he had the power and capacity to execute that will but further that under the law proof of the will had to be in accordance with the provisions of section 68 of the Indian Evidence Act Section 68 required that if a document had by virtue of some legal provision, to be attested, then it could not be used as evidence unless one attesting witness at least had been called for the purpose of proving its execution, if there was an attesting witness alive and subject to the process of the court and capable of giving evidence In this particular case there was no dispute that the attesting witness was alive and capable of giving evidence and subject to the process of the court and, therefore, any failure of such a witness from the witness box meant the failure of the plaintiff to prove the will The plaintiff candidly placed before the court his difficulty and the difficulty was not of his own creation If at all, the difficulty which the plaintiff faced had its roots possibly, in the machinations of the other side The plaintiff was not in this case faced with incapacities to adduce sufficient evidence to prove a fact but he was faced with an incapacity of producing such evidence as the law required under the statutory provisions The defect which, therefore, was likely to arise in the way of the plaintiff succeeding was in our opinion in the nature of a formal defect for, as we have said, there was a form which had to be adhered to in the matter of giving evidence in regard to the proof of the will

The other material question which was canvassed at great length, namely, whether we could in the circumstances of this case exercise our revisional jurisdiction to correct any error that a court may have committed while permitting or refusing to permit the withdrawal of a suit with permission to file a fresh one on the same cause of action The revisional jurisdiction of this Court is confined to the four corners of the powers given in section 115 of the Code It is well established that every error of law, or every error of procedure, or every error of fact could not be revised by the High Court under its powers under section 115 It was pointed out by Bose

J., in his order of reference in *Narayan Sonaji* v. *Shesharao Bithoba* (1) and that statement of the law by BOSE, J., was approved by their Lordships of the Supreme Court in *Keshardeo Chamaria* v. *Radha Kishen* (2) at page 28, that the words illegally or material irregularity do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. The scope of section 115 of the Code of Civil Procedure came up for consideration before their Lordships of the Privy Council in a number of decisions and their Lordships in those cases point out that there was no justification for the view that section 115 (*c*) of the Code of Civil Procedure was intended to authorize the High Courts to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non appealable cases. It is, therefore, clear that the powers of the High Court in revision are not available for correction of errors of law, however gross those errors may be, and whatever may be the result of those errors on the merits of the case. This power of the High Court is only available where the High Court could legitimately hold that the court below had exceeded its jurisdiction or had refrained from exercising a jurisdiction vested in it or it acted illegally or with material irregularity in the exercise of that jurisdiction, namely, committed such an error of procedure, a mandatory procedure, and the error had resulted in failure of justice or some such thing. Their Lordships of the Supreme Court in *Chamaria's case* quoted with approval a passage from the decision of the Privy Council in *N. S. Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras* (3) which passage is in these words and lays down the scope of section 115 of the Code of Civil Procedure clearly:

> Section 115 applies only to cases in which no appeal lies, and, where the Legislature had provided

(1) A.I.R. 1948 Nag. 258 (2) A.I.R. 1952 S.C. 23
(3) (1948-49) L.R. 76 I.A. 67

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Mukherji, J.

no right of appeal, the manifest intention is that the order of the trial court, right or wrong, shall be final The section empowers the High Court to satisfy itself on three matters (a) that the order of the subordinate court is within its jurisdiction (b) that the case is one in which the court ought to exercise jurisdiction, and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision If the High Court is satisfied on these three matters it has no power to interfere because it differs however profoundly, from the conclusions of the subordinate court in questions of fact or law

Applying the afore quoted principle to the case in hand, all that could be said was that possibly the court below committed an error in regard to its view of what was formal defect within the meaning of rule 1 of Order XXIII, or that the court below committed an error in regard to what could be deemed sufficient grounds' within the meaning of rule 1 (2) (b) of Order XXIII of the Code of Civil Procedure The error, therefore which the court below may have committed was in our opinion, at best, an error of law and not an error that in any manner affected the jurisdiction of that court to make or refuse to make an order which that court could under the provisions of Order XXIII

In the end we wish to add that since the exercise of the revisional powers by this Court are discretionary, this Court can refuse to exercise that discretion unless there was likely to be some substantial failure of justice In this case we are unable to say that, unless the order of the court below was set aside there was any failure of justice, much less a substantial failure thereof The court below has found, and so have we, that unless the plaintiff was permitted to withdraw the suit at this stage with the right to bring a fresh suit later, it was he that was likely to suffer injustice and not the other side

In this view of the matter also we are of the opinion that we should not exercise, even if we had the power, our powers in revision and interfere with the order of the court below

In the result we dismiss this application in revision with costs

Application dismissed

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CIVIL MISCELLANEOUS

Before Mr Justice Dhavan

MOINUDDIN AND OTHERS (APPLICANTS)

v

STATE OF UTTAR PRADESH (OPPOSITE PARTY)

1959

January 30

Co operative Societies in Uttar Pradesh—*Post of Auditors in—Higher scale of pay sanctioned for—Division of Auditors into two sections—Auditors in one section given the higher scale as a matter of course while those in the other subject to a qualifying test—Validity of—Constitution of India, 1950 Arts* 14 16 226 310 311

On the recommendation of the Pay Committee the State of Uttar Pradesh sanctioned a higher scale of pay for the Auditors in the Co-operative Department The department was thereafter split up into two sections—the Cane Co-operative Societies Auditing Section and the Co-operative Societies Auditing Section (General)—and while those in the former were given the higher scale as a matter of course, those in the latter were to receive it subject to a qualifying test prescribed by the department

On a petition under Art 226 of the Constitution praying for an order directing the State of Uttar Pradesh to give the petitioners in the General Section the higher scale of pay unconditionally

Held overruling the preliminary objection that there is as between the constitutional guarantee under Art 14 and the power conferred by Art 310 no inconsistency of the kind contemplated by the maxim *generalia specialibus non derogant* The exercise of all the powers—legislative executive or judicial—derived from the Constitution and a *fortiori* that under Art 310 are subject to and must be controlled by the provisions of Part III of the Constitution The protection of Art 14 is

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therefore available to a Government servant against any action which amounts to a purposeful discrimination as distinguished from a *bona fide* exercise of power under Art 310

Ray Kishore v *State of Uttar Pradesh* (1) dissented from *State of Madhya Pradesh* v *G C Mandawar* (2) followed and *Ishwari Prasad* v *Registrar, Allahabad University* (3) referred to

Held, further (i) that the guarantee of equal opportunity under Art 16 (1) of the Constitution in matters relating to employment or appointment to any office under the State is confined to the stage of initial employment and has no application to matters after entry in service such as promotion selection for higher posts increase or reduction of salary retrenchment or termination of service

Pandurang Kashinath More v *Union of India* (4) and *Sukhnandan Thakur* v *State of Bihar* (5) disapproved

(ii) That the Government's decision to impose a qualifying test on General Auditors was correct and the error if any, could rest in exempting the Cane Auditors from a similar test. The qualification or requisite standard of the staff of any department must however be left to the sole discretion of the Government and the High Court has no jurisdiction to interfere with the decision of the executive in that sphere Moreover a citizen may invoke Art 226 for the protection of his own rights but not to prevent any other citizen from obtaining something to which he was not alleged entitled (cases of quo warranto and habeas corpus are exceptions)

Civil Miscellaneous Writ No 3559 of 1957

The facts appear in the judgment

S N Dwivedi, Brij Lal Gupta and *S C Khare* for the petitioners

Laxmi Saran for the State

DHAVAN, J —This is a petition under Article 226 of the Constitution impugning the decision of the State Government to impose a qualification test on the petitioners before granting them the new scales of pay and praying for an order directing the State to place the petitioners in the aforesaid higher revised scale of pay unconditionally

The facts as stated in the affidavit supporting the petitioners, are these The petitioners, who are 37 in

(1) A I R 1954 All 343
(2) A I R 1954 S C 493
(3) A I R 1955 All 131
(4) (1958) 60 Bom L R 342
(5) A I R 1957 Pat 617

number are Auditors in the Co-operative Department of the State of Uttar Pradesh They have varying lengths of service to their credit, the number of years for each being specified in paragraph 5 of the affidavit They have been engaged in what the petitioners describe as the highly qualified work of auditing At the time of the recruitment of the petitioners the minimum educational qualification was the passing of the Intermediate Examination or any equivalent thereof Previously the entire Auditing Department consisted of a single section in which every Auditor enjoyed the same status and rate of pay But with the growth of Cane Co-operative Societies in Uttar Pradesh the department was split up in two sections the Cane Co operative Societies Auditing Section and Co operative Societies Auditing Section (General) to be called hereinafter as the Cane Auditors and General Auditors respectively Since the splitting up of the department the petitioners have been placed in the General Section

In the year 1948 a committee was appointed by the State of Uttar Pradesh to consider and suggest revision of pay of the State employees in different departments It is generally known as the U P Pay Committee It made certain recommendations for raising the scales of pay for the Auditors of the Co operative Department Those were partially accepted by the Government The petitioners contend that the Auditors in the Cane Department who at one time formed part of the Auditors of the Co-operative Department were sanctioned a revised scale of pay in the grade of Rs 120—6—200—E B—10—250 No qualifying test was prescribed in their case to enable them to enjoy the revised scale of pay The same grade of pay was sanctioned for the General Auditors including the petitioners But in their case a qualification test was prescribed by the department

The petitioners grievance is that the imposition of this test on the auditors in the Co-operative Department, (General), is arbitrary and unjust, and amounts to illegal discrimination between the General Auditors and

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the Cane Auditors They allege that there is no difference in the work and qualification of Auditors employed in the two branches of the Co-operative Audit Department The experience of the employees in the two departments is not distinguishable There is no reasonable basis for distinguishing between the employees of the two departments for the purpose of refusing their scales of pay The petitioners further contend that there is no difference in the nature of the work to be done by the Auditors of the two sections or the responsibility imposed on both of them The petitioners further contend that the decision to revise the scale of pay was based on the consideration that changed economic conditions required higher scale of pay It was not due to a decision to impose better or superior qualifications Therefore the requirement of a qualification test from the General Auditors while exempting the Cane Auditors amounts to an arbitrary discrimination against the former class of Auditors to which the petitioners have come to this Court under Article 226 of the Constitution and pray for the reliefs mentioned above

The petition is opposed by the State of Uttar Pradesh and a counter affidavit has been filed on its behalf A preliminary objection has been taken that a joint writ petition containing a prayer for mandamus cannot be filed on behalf of 35 persons The counter affidavit states the circumstances in which the impugned decision was made It is stated that prior to 1935, the Auditors of the Co operative Department audited the accounts of all Co operative Societies After 1935, the Auditors in the Subordinate Co-operative Service audited the accounts of the Cane Co-operative Societies This system continued till 1939 In that year, a number of Cane Auditors were recruited by the Registrar Co operative Societies, U P in connection with the Cane Development Scheme They were placed under the control of the Cane Commissioner In 1945, the Auditors serving in the Cane Development Scheme were transferred to the control of the Registrar Co-operative Societies U P, and were amalgamated with

the Auditors of the Co-operative Department But in 1947, the control of the Auditors serving in the Cane Development Scheme was again transferred to the Cane Commissioner U P Prior to 1947 Auditors for the Cane Department were recruited by the Public Service Commission on three different occasions—in 1939, 1943 and 1945

On 1st April 1952, the pay scale of the Auditors in the Cane Department was revised from Rs 75—120 to Rs 120—250 Simultaneously with the revision of scales of pay, the minimum educational qualification for Cane Auditors was raised to a Bachelor s Degree in Arts, Commerce or Science The notification by which this change was made is dated 9th September 1952 and filed as Annexure I of the counter affidavit The pay scale of the Co operative Auditors in the General Section was also raised to Rs 120—250 In their case too there was a simultaneous decision to raise the minimum educational qualification for future recruitment to a Bachelor s Degree in Arts Commerce or Science It is denied by the State that the reason for the raising of the scale of pay was to enable the employees to meet the increased cost of living They state that the scales of pay were revised to attract persons of better qualifications It is pointed out that the qualifications for future entrants to the service were raised simultaneously with the raising of the scales of pay

The existing Auditors in the General Section, many of whom were recruited a long time ago and did not possess a Bachelor s Degree were also granted the higher scale of pay on the date of notification they were enjoying a scale of pay of Rs 75—5—120 But this privilege was made subject to the condition that every existing auditor must pass a qualifying test to be held by the Public Service Commission before he could be selected for the higher scale of pay No test was prescribed for the Cane Auditors who were also given the benefit of the new scales of pay

It is denied by the State that exemption of the Cane Auditors from the test amounts to discrimination against

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the General Auditors It is stated that the General Auditors are required to audit the accounts of bigger Co-operative institutions, such as the U P Co operative Banks District Co operative Federations Co operative Unions and Societies of special types According to the State the auditing of institutions like these requires much greater knowledge and skill in auditing than in the case of Cane Unions It was, therefore thought that the skill and capability of the existing Auditors in the General Section should be tested by means of a special test It is further alleged by the State that the conditions of service and responsibility in the Cane Section are different from those in the General Section The Cane Section contains 60 Auditors and the General Section 327 With the creation of a separate Co-operative Audit Organization the scope for promotion for the General Auditors has considerably increased There are five posts of Senior Auditors carrying scale of Rs 200—350 and 51 more such posts are to be created shortly In addition, there are five posts of Regional Audit Officers in the scale of Rs 250—850 There is also a post of Deputy Chief Auditor and also Chief Audit Officer Thus it is pointed out that the auditors of the General Section have ample scope of promotion in their own Section They are also eligible for promotions as Inspectors in the Co operative Department But the Cane Auditors have hardly any scope for promotion in their Section Thus according to the State, not only the standard of skill and responsibility required in the two sections are different, but the conditions of service and prospects of rise in the General Section are also better The State therefore contend that the imposition of a test on the existing Auditors in the General Section is not an act of discrimination

Before considering the legal points raised by the petitioners it is necessary to clarify the position as regards facts It appears that the State decided to raise the minimum educational qualification for Auditors to be recruited in the future Simultaneously the scales of pay were made more attractive The Auditors already

in service however presented a problem They had been appointed at a time when the minimum qualification was lower than the proposed new qualification Their scales of pay were also lower The Government had two alternatives before them They could have left the existing Auditors untouched The result would have been that these old Auditors would not have been entitled to the new scales of pay It was conceded by learned counsel for the petitioners that the existing Auditors, whether in the Cane or the General Section had no legal right to demand that the existing scales of pay should be given to them But the Government, for reasons of policy decided to extend the benefit of the higher scales of pay to the existing Auditors In the case of Cane Auditors the privilege was extended without the imposition of any condition But the Auditors in the General Section were required to pass a qualifying test before they could be given the benefit of the new scales of pay It is necessary to state this background for a proper understanding of the nature of the grievance of the present petitioners Learned counsel for the petitioners admitted that he would have no case if the Government had decided to leave all the existing Auditors in their old scales of pay He also conceded that the petitioners could have no objection to the imposition of a test as such If Government had imposed a test on all Auditors, the petitioners could not have complained of any discrimination Learned counsel for the petitioners also conceded that no *existing right* or privilege of the petitioners had been infringed On the contrary he even conceded that the Government have conferred a favour on all the existing Auditors by deciding to extend the revised scale of pay to them His grievance is that this favour has been distributed in a manner which is discriminatory In conferring this favour Government have placed the General Auditors under a disadvantage it has imposed on them a test without passing which they could not avail of it, whereas the Cane Auditors get it without a test This, he submits amounts to discrimination which is forbidden by Article 16 of the Constitution

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DHAVAN, J

Learned counsel for the petitioners, *Mr S N Dwivedi*, who argued the case with ability, advanced the following argument against the validity of the decision to impose a qualifying test on the petitioners He conceded that the State had a large area of executive discretion in its dealings with and control over its civil servants and that the courts will not ordinarily interfere with this discretion But he contended that if in its treatment of a civil servant Government violate the principles laid down in Articles 16 and 14 of the Constitutions its decision will be unconstitutional He further contended that the protection of these two Articles is not limited to the stage of initial appointment but extends to subsequent promotion, the increase or reduction of salaries, selection for posts and termination of services In other words he contended that the principle of equal opportunity laid down by the Constitution protects the Government servant throughout his service If Government violate the principles laid down in Articles 16 and 14 either in making the initial appointment or subsequently in making promotions raising or reducing salaries selecting officers for special or prize posts or in the matter of termination of appointment such action will be hit by either or both of these Articles

The present case raises two questions (1) whether the action of the State Government in imposing a qualification test on the Auditors in the General Section without prescribing a similar test for the Cane Auditors amounts, in all the circumstances of the case to discrimination and (2) if it does, whether such discrimination is hit by Articles 16 and 14 of the Constitution

A preliminary objection was taken by learned counsel for the State that the petition is misconceived It was contended that Articles 14 and 16 do not apply to the petitioners case at all, as the powers of the State in regard to the tenure of office of its employees are conferred by Article 310 of the Constitution and that these powers are not controlled by Articles 14 and 16 I shall deal with this objection first

Counsel for the State relied on a DIVISION BENCH of this Court in *Raj Kishore* v *State of Uttar Pradesh* (1) in which AGARWALA, J, held (RANDHIR SINGH, J concurring) that Article 14 does not control Article 310 Mr *Dwivedi*, on the other hand, relied on two Bombay and Patna decisions (discussed below) and contended that the reasoning of AGARWALA, J, in *Raj Kishore* v *State of Uttar Pradesh* (1) is not correct In that case the Government had terminated the services of an employee in the exercise of their power, under Rule 465 of the Civil Service Regulations, which gave it the right to retire any Government servant after he has completed 25 years qualifying service without any reasons, and further made it clear that no claim to special compensation on this ground shall be entertained The employee, Raj Kishore, filed a petition under Article 226 of the Constitution on the ground that the decision of the Government retiring him was discriminatory He alleged that Government had given no reasons for this action and that it had not indicated to him that he was considered to have outlived his usefulness or to be inefficient or mediocre It was contended on behalf of the petitioner that Rule 465 was *ultra vires* of the Constitution because it vested an arbitrary power in Government to select a particular servant for unequal treatment and was contrary to the provisions of Article 16 of the Constitution It was also contended that the rule violated the principle of equality in Article 14 the object of which is to prevent any person or class of persons from being singled out as a special subject for discrimination or hostile legislation AGARWALA, J held that Rule 465 vested arbitrary power in the hands of the Government to single out from the class of Government servants who have completed 25 years of service for special treatment by compulsorily retiring him without assigning any reason while not applying the same rule to any Government servant belonging to the same class He took the view that the rule violated the spirit underlying Article 14 of the Constitution but he reluctantly came to

(1) A I R 1954 All 343

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the conclusion that the rule was not *ultra vires* for that reason because it was consonant with the principle embodied in Article 310 He further held that it is Article 310 which governs the matter and not Article 14 He observed

> In the matter of termination of the service of a Government servant, the provisions to be considered are Articles 310 and 311 The combined effect of these two provisions is that except as laid down in clauses (1) and (2) of Article 311 and except as laid down in clause (2) of Article 310 there is no restraint on the power of the State to terminate the services of a Government servant at pleasure Clause (2) of Article 310 and clause (1) of Article 311 are admittedly inapplicable to the present case I have already held that clause (2) of Article 311 also does not apply to the facts of the present case Therefore, it follows that the services of the applicant could be terminated at the pleasure of the State which means without assigning any reason Article 14 in my judgment, does not control Article 310 The reason is that Article 14 is a general provision relating to all kinds of persons while Article 310 deals with a special or particular matter namely, Government servants and termination of their services The maxim *generalia specialibus non derogant*, that is, Special provisions will control general provisions applies As the Judicial Committee observed in *Barker* v *Edgar* (1) that when the Legislature has given the attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provisions unless it manifests that intention very clearly Each enactment must be construed in that respect according to its own subject matter and its own terms
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> There is all the more reasons why the above rule should apply when the special provision is contained in the very same enactment in which

(1) L R [1898] A C 748

the general provision finds place Then again Article 14 speaks of law and laws Article 310 is a constitution provision and is not included in the term law or laws as mentioned in Article 14 The entire constitution must be read as one whole and every part of it must be given full effect If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate services of its servants at pleasure In my opinion, Rule 465 is not rendered void by reasons of Article 14

The maxim *generalia specialibus non derogant* will apply only when a prior endeavour to harmonise two conflicting provisions of the same statute has been made and failed With respect, no such attempt appears to have been made in *Raj Kishore's case* (1) in accordance with the rule of harmonious construction As was observed by the Supreme Court in *Venkataramana Devaru* v *State of Mysore* (2) the rule of construction is well settled that where there are in an enactment two provisions which cannot be reconciled with each other they should be so interpreted that if possible effect should be given to both The question whether Article 14 controls the dealings of the State with its employees requires a careful adjustment of the respective spheres of Articles 14 and 310 AGARWALA J merely observed that Article 14 does not control Article 310 because Article 14 is a general provision relating to all kinds of laws and all kinds of persons while Article 310 deals with a special or particular matter, namely Government servants and termination of their services, with respect the matter is not so simply disposed of

Generalia specialibus non derogant was explained by LORD SELBOURNE, C in *Seward* v *The Vera Cruz* (3), in these words whether general words in a later Act are capable of reasonable and sensible application without extending them to subject specially dealt with by earlier legislation that earlier and special legislation

(1) A I R 1954 All 343 (2) A I R 1958 S C 256
(3) L R [1884-85] 10 A C 59

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is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so This applies in the case of two Statutes one of them being enacted later In Maxwell's *Interpretation of Statutes*, 9th Edition, the rule has been thus described

> It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute (*sup* p 85) to say that *a general Act is to be constructed as not repealing a particular one, that is, one directed towards a special object or a special class of objects* A general later law does not abrogate an earlier special one by more implication Generalia specialibus non derogant But Maxwell made it clear that for this rule to apply the Act must cover the same territory (p 188)

When two parts of the same statute, and that statute a constitution are being interpreted the limitation to the doctrine must not be lost sight of On the one hand, it is true that if a general intention is expressed in one part of the Constitution and a particular intention in another part which is incompatible with the general one the particular intention is treated as an exception to the general one (Maxwell p 176) On the other hand the following principles must be applied and exhausted before this rule is applied *First the two provisions must cover the same area before one can be treated as an exception to the other* But it cannot be said that Article 310 and Part III cover the same area The one deals with the tenure of office of State servants and the other with fundamental rights of citizens It may be true that Articles 310 and 311 deal with a particular matter but that matter is not a *special area within the territory* of Part III It deals with the powers of the State in regard to its servants But there are other provisions conferring other powers on other authorities in particular matters If each of these provisions is accorded the status of a special provision" the general provision relating to fundamental rights and

therefore an exception to it, fundamental rights may be so eaten away by exceptions as to be rendered illusory *Secondly, the two provisions must be so incompatible with each other that they cannot be reconciled and the special provision must be treated, within its own area, as an exception to the general provision*

In this case even assuming that Article 310 is a special provision vis a vis Part III, a proposition with which I do not agree it is possible to reconcile the two With respect no attempt to this effect appears to have been made in *Raj Kishore's* case (1) Article 14 does not in the least abrogate or derogate from the power of the State to terminate the services of any servant at its pleasure it merely enjoins that this power should not be used in a discriminatory manner But the content of the power vis a vis any particular employee is not diminished by Article 14 *Thirdly, the entire Constitution must be read as a whole, and each part must be given the same sanctity without giving undue weight to any particular part* This applies with particular force to the Constitution of India which is very detailed and elaborate The edifice of our Constitution contains many mansions, no part of which can claim a greater sanctity than others except to the extent clearly specified, expressly or by clear implication in the *Constitution itself Fourthly, each and every part of the Constitution must be so interpreted as to preserve the spirit of a Constitution,* which is a fundamentally different document from other statutes As was observed by HIGGINS, J, in *Attorney General v Brewery Employees Union* (2)

> Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting to remember that *it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be*"

(1) A I R 1954 All 243 (2) (1908) 6 C L R. 469

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The spirit of our Constitution is contained in the Preamble The principles expressed in the Preamble must permeate every part of the Constitution without any exception One of them is to secure to all its citizens equality of status and of opportunity I must not be understood to mean where the language of the statute is plain the words must be twisted to bring the language in accord with the spirit of the Preamble But in considering the scheme of the Constitution as a whole and the respective spheres of different parts, the Preamble can be treated as a key to open the minds of the Act

The real question is whether the powers of the Government under Article 310 are exempt from the injunctions contained in Articles 13 and 14 The scheme of the Constitution does not favour any exemptions except those specified in the Constitution itself Article 13 says that *all laws* in force , in so far as they are inconsistent with the provisions of Part III, shall to the extent of such inconsistency be void It further enjoins that the State shall not make *any* law which takes away or abridges the fundamental rights conferred by Part III and that *any law* made in contravention of this injunction shall, to the extent of the contravention be void The phrases all laws and any laws have been made subject to no exceptions with the result that *any law, by whomsoever made or passed*, shall be void if it contravenes the provisions of any Article relating to fundamental rights

AGARWALA, J, argued that Article 310 being a special provision dealing with a special or particular matter (Government servants and termination of their services) cannot be controlled by Article 14 which is a general provision With respect there are several answers to this argument *First*, Article 310 is *not* a special provision within the area of Part III By way of contrast Article 362 read with 291 is an illustration of a special provision for it preserves the rights and privileges of former Rulers of Indian States and enjoins in effect that Parliament shall not make laws taking away those rights This, being a special provision,

may be treated as an exception to Article 14 which enjoins that all citizens shall enjoy equality before the law and the equal protection of the laws But Article 310 is neither a special provision nor an exception vis a vis Part III It says, Any person holds office during the pleasure of Government This Article deals with the power of the State in its relation with every servant *individually* It invests the State with the power to terminate at its pleasure the service of *any particular employee* This power has no limitation vis a vis *that* employee (except of course the safeguard in Article 311) But to terminate the service of any particular employee is one thing, to use that power as a cloak for discrimination against or in favour of a whole class community race or religion is quite another thing The first is within the power under Article 310, the second is not If the State says to an employee, You are retired under rule 469 of the Civil Service Regulations, the action is protected by Article 310 and the State is not called upon to explain why it selected X and not Y for compulsory retirement But if the State says to X You are retired *because you belong to this particular community, or if X Y, Z* and others *prove* that they have been retired *because they belong to a particular community*, the State has used Article 310 not merely to retire an individual but *to discriminate against a whole class* Whether one views its action as an abuse of the power under Article 310 or exceeding that power the result is the same one must hold that the State has travelled beyond the orbit of Article 310 and wandered into the orbit of another Article 14 As it has left the protective sphere of Article 310 its action will be attracted and dragged down by the constitutional pull or weight of the particular Article into whose orbit it has strayed The orbits of Parts III and XIV are different though they revolve round the same Constitution

With profound respect, therefore, the entire argument of AGARWALA J s judgment treating Articles 14 and 310 as a special and general provision respectively is based on a premise which does not exist *Secondly*,

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it ignores the all inclusive scope of Article 13 which says that *all* existing *laws* which are inconsistent with the provisions of Part III, (including Article 14), shall be void and further that any future *law* which takes away or abridges the rights conferred by this Part shall be void Any rules or notifications made by the State under Article 309 of the Constitution are Laws as defined by Article 13 and must obey the injunction contained in that Article *Thirdly*, the rule relating to general and special provision applies whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former . [Craies on Statute Law, Fifth Edition, p 265, quoting ROMILLY, M R in *Fretty* v *Solly* (1) But Articles 14, 15 or 16 do not overrule Article 310 in any sense There is no inconsistency between the powers conferred under Article 310 and the injunctions imposed by Articles 13 14 15 and 16 The power is capable of being exercised to the fullest extent against any particular servant without violating these injunctions *Fourthly*, the language of Article 14 is all-embracing and thus the State shall not deny the right of equality *in any sphere of its activity* to any person *Fifthly*, if the powers of the Government are to be exempted on the ground that they are contained in a particular provision the powers of other authorities contained in *other* provisions may also have to be exempted Chapter II deals with the qualifications for membership of Parliament, Chapter IV with the appointment, etcetera of Supreme Court Judges, and Chapter V with High Court Judges They all empower Parliament to pass special laws There are other provisions dealing with particular matters If AGARWALA, J 's dictum is applied, the result may be that all the special provisions with particular matters will be exempt from the control of Part III In this manner, the freedoms conferred by this Part may be eaten away by exceptions *Sixthly*, as mentioned above the chapter relating to fundamental rights admits of *no exceptions except those which are specified in the Constitution itself* Article 33 invests Parliament with the power to modify the

(1) (1859) 26 Beav 606,610

rights conferred by Part III in their application to the members of the armed Force or the Force charged with the maintenance of the public order it has been given the power to restrict or abrogate these rights so as to ensure the proper discharge of their duties and the maintenance of discipline among them Article 358 provides for the suspension of the provisions of Article 19 during emergencies Article 359 provides for the suspension of the enforcement of fundamental rights during emergencies Subject to these and any other express exceptions in the Constitution the provisions relating to fundamental rights in Part III admit of no other exceptions *Seventhly*, AGARWALA J s dictum will place the Governor and his powers under Article 310 on a pedestal which even Parliament and its laws do not enjoy If any law passed by Parliament can be struck down on the ground that it violates any provision of Part III, there is no reason why any rule or notification or order of the Governor under Article 310 should not be subject to a similar control

AGARWALA, J., observed If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants at pleasure Thus he apprehended that any control of Article 310 by Article 14 may render the powers under the former Article illusory With respect there is no ground for any such apprehension which is based on a misapprehension of the nature and purpose of the control of Article 14 over Article 310 Part III does not derogate in the least from the powers of Government to terminate the services of any employee at pleasure It simply ensures that this vast power shall not be used in a discriminatory manner and that the State employees shall not be made the victims of bigotry, racialism casteism or provincialism—evils expressly banned by Article 15 But within the constitutional limits imposed by Part III, full effect must be given to the power under Article 310 No employee has any remedy against any action of the State however arbitrary it may be

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But arbitrary is not the same thing as discriminatory If Government uses its power under Article 310 in a discriminatory manner, its action will be hit by Article 14 Several illustrations can be given If the U P Government were to issue a notification compulsorily retiring every South Indian employee who has completed 25 years of service on the alleged ground that South Indians cannot adjust themselves to the social conditions in Uttar Pradesh, this would be an unconstitutional exercise of its absolute new power under rule 465 Again if the Central Government revives the theory of martial and non martial' races and issues a notification terminating the services of every person belonging to specified non martial races in the defence services, (to which the protection of Article 311 does not extend), the notification even if issued in the honest belief in the truth of this doctrine, will be hit both by Articles 14 and 16—by the first because it is generally discriminatory and by the second because it discriminates between citizens employed in the Armed Forces on the ground of race But if AGARWALA, J s interpretation is accepted these notifications will be sacrosanct as they were issued under a special provision of the Constitution

The practical adjustment of the absolute power under Article 310 and the fundamental rights under Part III will depend upon the facts of each case Any action which is patently discriminatory will be struck down For example to take the very rule which was considered by AGARWALA, J any systematic attempt to apply rule 465 of the Civil Service Regulations to officials belonging to a particular race, religion or caste and to weed them out in the colourable exercise of the absolute power under rule 465 will be hit both by Article 14 and Article 16 The action of the State, on proper proof, will be declared unconstitutional on the ground that it is part of a policy of purposeful discrimination , to quote the words of the U S Supreme Court in *Patton v State of Mississippi* (1) On the other hand if certain employees are compulsorily retired in the *bona fide* exercise of the

(1) 332 U S 465 92 L Ed 76

power under rule 465 while a few others though similarly placed are not, the decision is unassailable, and the State need not explain why it picked out *A B C* for retirement in preference to *X Y Z* The decision is protected by Article 310 however unjust it may appear to the court

Practical wisdom and common sense therefore suggest that the powers of the State under Article 310 are absolute as against any individual employee but should not be exercised in a manner which society will condemn as discriminatory Cases which are patently discriminatory present no problem nor do cases where the decision though harsh is *bona fide* and not discriminatory The difficulty is created by border line cases—the border is always troublesome for those who guard it—where it is difficult to ascertain whether the impugned action is valid though arbitrary or invalid because discriminatory The court will decide each case according to its own peculiar circumstances

But the starting point of any discussion on the respective spheres of Articles 14 and 310 must be that Article 14 requires that the State shall not deny to any person equality *in any sphere of its activity*, that this injunction transcends every power of the State, and that there are no exceptions to it except those which are specified in the Constitution itself As was observed by DAS, J (as he then was) in *State of Madras v Smt Champakam Dorairajan*, (1) The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in Part III" If I may respectfully paraphrase this observation it means that the directions and injunctions in Part III transcend and control all powers including those which are derived from 'special' provisions of the Constitution

I am supported in my opinion by the fact that the Supreme Court, in every case in which a State employee alleged that he had been discriminated against in violation of Article 14 examined his contentions on merits.

(1) A I R 1951 S C 226

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In not a single case did the Court reject the submission based on Article 14 on the ground that the powers of the State under Article 310 were not controlled by Article 14. In *Satish Chandra Anand* v. *Union of India* (1), a civil servant who had been engaged on a temporary basis of a contract was discharged from service after notice. He filed a petition before the Supreme Court under Article 32 of the Constitution and argued that his rights under Articles 14 and 16 (1) had been infringed. The Supreme Court rejected this contention on merits and held that in fact, there had been no discrimination against him. They also held that Article 16 (1) was equally inapplicable as the whole matter rested on contract. In the *State of Madhya Pradesh* v. *G. C. Mandawar* (2) a Government employee filed a petition under Article 32 on the ground that a resolution of the Government of Central Provinces and Berar (now Madhya Pradesh), fixing a scale of dearness allowance for its servants discriminated against him in violation of Article 14 of the Constitution. It was contended on his behalf that the resolution of fixing a scale of dearness allowance under rule 44 of the Fundamental Rules was law as defined in Article 13 (3) (*a*) of the Constitution, and if that law infringed Article 14, it could be declared void. In considering this argument the Court observed, "That is a contention *which is clearly open to him* and the question, therefore, that has to be decided is whether the resolution dated 26th September 1942, is bad as infringing Article 14." The argument was examined on merits and rejected.

It appears therefore, that the view expressed by AGARWALA, J. in *Raj Kishore's* case (3) cannot be reconciled with the view expressed by the Supreme Court in the *State of Madhya Pradesh* v. *G. C. Mandawar* (2) which is a later case, (AGARWALA and SINGH, JJ., delivered their judgment on 9th November 1953, and the Supreme Court case was decided on 13th May, 1954). Following the example of MOOTHAM, J. in *Ishwari Prasad* v. *Registrar, Allahabad University* (4), when he ignored a

(1) A.I.R. 1953 S.C. 250
(2) A.I.R. 1954 S.C. 493
(3) A.I.R. 1954 All. 343
(4) A.I.R. 1955 All. 131

Full Bench decision of this Court in favour of principles subsequently laid down by the Supreme Court, I prefer to follow and apply what I believe to be the view of the Supreme Court. I therefore, hold that the argument based on Articles 14 and 16 is open to the petitioners and overrule the preliminary objection I shall now proceed to examine both contentions on merits

Mr *Dwivedi* pointed out that Article 16 (1) does not refer to employment but matter relating to employment According to him, the addition of the words matters relating to before the word employment makes a significant difference in the scope of this clause If it had said, there shall be equality of opportunity of all citizens in employment', it might have been possible to argue that the guarantee of equality is confined only to the stage of seeking employment But the clause goes further and extends the guarantee *in all matters* relating to employment What are these matters relating to employment ?

Mr *Dwivedi* contended that they include such matters at promotion selection for prize posts termination of service and so on These are, according to him matters relating to employment and as the clause guarantees equality of opportunity for all citizens in such matters", it means that it is intended to protect the citizen even after he has entered the service of the State It is a safeguard against discrimination throughout his career as a servant

I think that the addition of the words matters relating to' is not of itself of much significance It is noteworthy that these words govern not only employment but also the following words, appointment to any office under the State The clause can really be split in two in the following manner

> There shall be equality of opportunity for all citizens in matters relating to employment and there shall be equality of opportunity for all citizens in matters relating to appointment to any office under the State

It is obvious that appointment to any office under the State means the act of making appointment to a

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particular office The word is not 'appointment' but appointment to any office A man may hold an appointment for any length of time but his appointment *to any office* takes place only once as the result of an act of appointment Therefore, the words appointment to any office refer to the initial act of appointment to any office and not to subsequent matters like increase in pay promotion or termination of service Indeed it would be absurd to suggest that the termination of a person's service is a matter relating to his appointment *to* any office Thus the addition of the words matters relating to does not of itself have the effect of extending the guarantee of equality beyond the stage of initial appointment

In my view the word matters includes such things as inviting applications for an appointment advertising a particular post prescribing qualifications for any office, facilities for interview, and so on All these things are matters relating to appointment to any office under the State and there must be equality of opportunity in respect of them For example, if an all India post is advertised only in an obscure provincial paper published in a regional language the result would be a denial of opportunity to all qualified candidates who live in regions where the paper does not circulate or who do not know that particular regional language Or again, if the place of interview is deliberately fixed at a place which is inaccessible to an overwhelming majority of the qualified candidates and is selected with the ulterior purpose of favouring a limited class of candidates resident in that place there will be a denial of equality of opportunity in the matter of interview, a matter relating to appointment to that office

Thus the words matters relating to" do not have the effect of extending the scope of the word 'employment

In *Sukhanandan Thakur* v *State of Bihar*, (1) AHMAD, J., relying upon what he considered the dictionary meaning of the word employment, held that it

(1) A.I.R. 1957 Pat 617

refers to a condition in which a man is kept occupied in executing any work, and that it means not only an appointment to any office for the first time but also the continuity of that appointment. According to him, this implied wider meaning finds support from two things, (1) the dictionary meaning of the word employment and (2) the expression employment or appointment. With the utmost respect the dictionary meaning of the word employment does not always mean a condition in which a man is kept occupied in executing any work. My copy of Webster's Collegiate Dictionary contains the following meaning of the word employment *'act of employing, or state of being employed as to seek employment'*. The Great Oxford Dictionary gives the following three meanings of the word "employment": 1. The act of employing, 2. The state of being employed, 3. Service. Thus according to the dictionary the employment' may refer *either* to the initial act of employing a person *or* to his condition of being employed. Two alternative meanings of this word are possible and to determine its meaning in this case one has to look to the context in which the word is empolyed.

The choice between two alternative constructions should be made in accordance with well recognized canons of interpretation. I may summarise some of them very briefly. First if two constructions are possible the court must, as reiterated by the Supreme Court in *The State of Punjab* v *Ajaib Singh* (1) adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. Secondly as was observed by P. B. MUKERJI, J., in *Ram Hari* v *Nilomani Das* (2) constitutional provisions are not to be interpreted and crippled by narrow technicalities but as embodying the working principles for practical government. Thirdly, as laid down by the U. S. Supreme Court in *Gompers* v *United States* (3)

(1) A.I.R. 1953 S.C. 10. (2) A.I.R. 1952 Cal. 184.
(3) (113) 589. L. Ed. 1116, 1120.

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the provisions of a Constitution are not to be regarded as mathematical formulae and that their significance is not formal but vital I take this observation to mean that practical considerations rather than formal logic must govern the interpretation of those parts of a Constitution which are obscure or capable of two alternative meanings Fourthly as was observed by the Madras High Court in *Dorairaja* v *State of Madras* (1) in a choice of two alternative constructions, the one which avoids a result unjust or injurious to the nation should be preferred Fifthly, before making its choice between two alternative meanings, the court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them Lastly, and above all, as was observed by the Supreme Court in *Gopalan* v *State of Madras* (2), the court should proceed on the presumption that no conflict or repugnancy (between the different parts) was intended by the framers of the Constitution The last principle was laid down in slightly different language by the Privy Council in *James* v *Common Wealth of Australia* (3), in which Lord WRIGHT observed as follows

> The question then is one of construction and in the ultimate result must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument in which one part may throw light on another

These principles of constructions are well known, though it is not always easy to apply them to a particular case I shall however endeavour to consider the meaning of the phrases matters relating to employment and appointment to any office under the State' in the light of these principles

The question is whether the guarantee of equal opportunity under Article 16 is confined to the stage of initial employment or appointment or extends even beyond it This question involves an interpretation

(1) A I R. 1951 Mad. 120 (2) 1950 S C 27 93
(3) L R [1936] A C 578 (P C)

of the language of clause 1 of Article 16 Two questions arise in this case The first is whether Part III of the Constitution controls the powers of the State under Article 310, the second how far the control of Article 16 extends, that is, whether the guarantee of equal opportunity under Article 16 is confined to the initial stage of employment or extends beyond it The second question does not arise if Part III (including Article 16) does not control Article 310 The first requires an inquiry into the respective spheres of Parts XIV and III of the Constitution, the second into the meaning of the actual words of clause (1) of Article 16 Thus the two questions though connected are distinct Even if the court holds that Article 16 controls the power under Article 310 it does not follow that clause 1 applies to the petitioners case unless it is further held that the words employment' and appointment in that clause include the stage after the initial appointment I must, therefore, examine the language of Article 16

Article 16 is as follows

> 16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State
>
> (2) No citizen shall, on grounds only of religion, race caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of any employment or office under the State
>
> (3)
>
> (4)
>
> (5)

Article 16 is an extension of the general principle of equality before the law to a particular sphere--that is, opportunity for State employment The Article consists of five clauses The first two contain the content of the guarantee and the last three are provisos which expressly reserve certain powers for the State Clause

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2 is wider than clause 1 It is negative in character and prohibits discrimination between citizens on the ground of religion, race, caste, sex, descent, place of birth residence or any of them The purpose of this clause like that of Articles 15 and 14, is to ban from Indian life the conception of a master race or herren volk It forbids the relegation of any citizen to an inferior status, like the Jews in Hitlerite Germany or the Asians and Africans in South Africa, because of his religion or race or caste or sex or descent or place of birth or residence It holds out a promise to all citizens that whenever and wherever a group of citizens compete for employment or office under the State no particular religion or race, et cetera shall be considered either a disqualification or an extra qualification It enjoins that religion race and the other attributes specified in this clause will be treated as irrelevant by the State when considering the qualification of citizens competing for any employment or office under the State

Clause 1 provides a guarantee of equality of a positive nature It enjoins that all citizens must have equality of opportunity in matters relating to employment or appointment to any office under the State The scope of this clause is wider than that of clause 2 Without this clause, it would still be possible for the State, while fully observing the injunction against discrimination on the ground of religion, race, caste, et cetera to confine their recruitment to State services to a favoured few For example, not so very long ago, recruitment to the foreign and diplomatic service in Great Britain was so arranged that only the sons of the wealthiest classes could enter it There was no discrimination on the ground of religion or race, but a poor man's son had practicaly no chance of entering the British diplomatic service One of the qualifications, as far as I recollect, was the possession of a private income of £500 a year This sort of discrimination is banned by clause 1 All citizens, rich or poor must be given an equal opportunity when competing for the loaves and fishes of State jobs It commands that the State must

give equal opportunity to all citizens in matters relating to employment or appointment to any office under the State The two phrases requiring interpretation are equality of opportunity and matters relating to employment or office

The words equality of opportunity do not present any difficulty in interpretation They contain a guarantee that no avenue leading to employment under the State shall be closed to any citizen of India provided he has the necessary qualification A necessary corollary of this guarantee may be that the State shall not impose qualifications which are deliberately designed to keep out any particular class community, or section of citizens Furthermore the guarantee is not limited to services of paid jobs, it also extends to any office under the State, honorary or otherwise It holds out to the people a solemn assurance that no office, however, high, shall be legally beyond the reach of any citizen, however humble The principle of social equality underlying this clause is a complete negation of the philosophy of some of our old *Shastras* which enjoin that Shudras must confine themselves to the service of the higher castes We know how under Ramarajya, Shambooka the Sudra was beheaded for the offence of practising austerities and (presumably) reading the Vedas to-day he would be qualified to be appointed a Professor of Vedic Studies in a State University This clause reflects the general purpose and policy of the Constitution to prevent the division of the nation into superior and inferior groups like the Aryans and Jews in North Germany and whites and blacks in South Africa and to achieve this purpose, it specifies certain things which the State is expressly prohibited from looking into when considering the qualifications of any citizen for any job or office These are his or her religion race, caste, sex descent, place of birth and residence The phrase equality of opportunity extends the concept of social democracy to the sector of State services and public offices

The phrase in matters relating to employment presents the real controversy It follows the words

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'equality of opportunity The two phrases read together guarantee to every citizen equality of opportunity in matter relating to employment or appointment to any office under the State How far does this guarantee extend? The answer depends upon the meaning of the words in matters relating to employment According to Mr *Dwivedi*, the guarantee of equal opportunity is not limited to the stage of initial appointment but also extends to subsequent promotion, selection or reduction of salary or termination of service If the State, in dealing with these matters, discriminates between citizens, its decision will be hit by Article 16 If I may put the matter in my own words Mr *Dwivedi* would like the guarantee of equality of opportunity to protect the citizen not only when he is looking for State employment but also to throw its protective mantle over him throughout his career of service under the State If at any stage the State discriminates against him in the matter of promotion or selection for promotion recruitment termination of service and other kindred matters, the long arm of Article 16 should reach forth and crush the discrimination

The words employment and appointment to office occur several times in Article 16 in its different clauses Clause 2 says that no citizen shall be ineligible for or discriminated against in respect of any employment or office under the State Now, a person is considered ineligible or eligible for employment only at the time of initial appointment No question of his ineligibility can arise *after* he has been selected for the job or post The word employment in this clause refers to the stage of selection or appointment

Clause 3 is in the nature of a provision to Article 16 It runs as follows

> Nothing in this Article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State *prior to such employment or appointment*"

This clause reserves to the State the power to prescribe in respect of any job or office a qualification of residence within the State *prior to such employment or appointment* Now a prior residential qualification is relevant only at the stage of appointment No question of a *prior* residential qualification arises after the employee has joined service, and such a requirement would be totally irrelevant in the matters of promotion, increase of salary selection for higher posts or termination of service The test of residence is never required for promotion The State may not appoint any person on the ground that he does not have the minimum residential qualification but for the State to say We shall not increase X's salary because ten years ago he did not reside in this State for six months prior to his appointment would be absurd The words employment and 'appointment in clause 3 appear to refer to the initial stage of employment only

Clauses 4 and 5 also contain provisions reserving certain powers to the State Clause 4 reserves the right of the State to reserve appointments or posts for backward classes This obviously has no reference to any matter after appointment such as promotion It is well known that after appointment no employee is *promoted* on the ground that he belongs to a backward class Clause 5 saves any law requiring that any religious office must be given to a person professing the particular religion to which the office belongs This clause saves laws imposing religious qualifications for appointments to religious posts—as for example requiring that the priest of the temple at Badrinath must be a Namboodri Brahmin This clause is obviously concerned only with the initial appointment to a religious office

Thus, clauses 3, 4 and 5 which are provisos to the first two clauses and which reserve to the State certain powers in the matter of employment and appointment to office are concerned only with powers relating to initial acts of appointments They completely ignore matters which may arise after appointment and during service The omission is significant It shows that the makers of the Constitution, when using the words in matters

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relating to employment or appointment to any office had in mind only the initial stage of appointment They guaranteed equality of opportunity and fair competition *at the stage* of seeking State employment but reserved certain powers for the State *relating to this stage* Had they intended to extend the right under Article 16 (1) even beyond the initial stage of employment the provisos would have reserved to the State some other powers in such vital matters as promotions, selection for higher posts, termination of service and particularly, retrenchment But the provisos completely ignore every stage *after* the initial act of employment or appointment The inference must be that the stage after the initial appointment stage was not in the mind of the makers of the Constitution at all when they used the phrase in matters relating to employment or appointment to any office They only reserved powers in regard to the initial stage of appointment because the scope of equality under clause 1 is confined to this stage

Article 16 applies to citizens and the guarantee of equality of opportunity in matters relating to employment and appointment to office is meant for citizens only On the other hand, under our Constitution non citizens are eligible for public services and posts under the Union and the States This is made clear in Part XIV of the Constitution, which relates to services under the Union and the States Article 309 empowers the appropriate Legislature to regulate, subject to the provisions of the Constitution, the recruitment and conditions of service of persons appointed to public services and posts in connection with affairs of the Union or of any State The use of the word persons is significant It is not there by accident or mistake for whenever the Fathers of the Constitution wanted a particular post to be reserved for citizen they did so by using the word 'citizen in the Article dealing with that post Seven posts, specified in the Constitution, have been expressly reserved for citizens These are the office of President [Article 58 (1) (*a*)] Vice President [Article 66 (3) (*a*)] Governor of State (Article 107), *Judge* of the Supreme

Court [Article 124 (2)] or of a High Court [Article 217 (2)] Attorney General of India [Article 76 (1)] and Advocate General of State (Article 165) Apart from these posts, a non citizen can hold any post or office under the Republic or join any service under the Union or the States Even the Auditor General and Comptroller General of India and the Chairman of the Union or State Public Service Commission need not be citizens Article 314 of the Constitution expressly provides that every person who was appointed by the British Crown in India and should elect to continue, after the Constitution, to serve the State, shall be entitled to receive the same conditions of service and the same rights to which he was entitled before the commencement of the Constitution This Article was inserted as an encouragement to non citizen servants to continue in service

These are not empty provisions, for hundreds of citizens are serving in various capacities under the Union and the States and some of them are holding important posts The fathers of the Constitution for reasons of national policy made non citizens eligible for recruitment to public services and posts Our Constitution was not framed by jurists sitting in an ivory tower or by professors shut up in a class room It was drafted and finalised, after prolonged discussion and debate, by persons with considerable administrative experience and intimate knowledge of the people and its needs The Founding Fathers were conscious that India in 1950 was—(it still continues to be)—very backward as compared with the more advanced countries of the West in science, industry agriculture medicine and many other matters They realized that the country would need the service and assistance of foreign workers and experts for a long time For this reason they made non citizens eligible for service under the Republic Under Article 314, they gave the State power to recruit non citizens to its services, at its discretion To day, if the Union Government decides in the national interests, to create an Indian Service of Scientists composed of citizens and non-citizens it has the power to do so under the Constitution

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Employment of foreign labour, skilled and unskilled on a large scale is frequently made by Sovereign States in their own interests The British Government due to shortage of man power in England has encouraged the employment of foreign workers During the First Year Plan of the U S S R the Soviet Government recruited a large number of foreign skilled workers whose number ran into lakhs The makers of our Constitution were mindful of these considerations when they made non citizens eligible for recruitment to public services and posts

The meaning of the words empolyment and appointment may be examined against this background The guarantee of equality of opportunity in matters relating to appointment is meant for citizens only, where as all the services and posts under the Republic, (barring a few specified posts) are open to non citizens Therefore in interpreting Article 16 (1) care must be taken to avoid any interpretation which shall, in the name of equality create inequality between the different classes of State servants If the meaning of employment is restricted to the stage when citizens are competing for or seeking employment there is no inequality There can be no legitimate grievance if India like any other national sovereign State confers a fundamental right on its own citizens But if the meaning of employment and appointment is stretched to include all the stage beyond the initial employment the nature of guarantee under Article 16 (1) changes It is converted from *an equal right of citizens into an unequal right of employees* who are citizens to the *exclusion of employees who are not* The result may be inequality between citizen employees and non citizen employees for it will give to the former a right which is denied to the latter By way of illustration both in the Patna and Bombay cases a non citizen employee of the State would not have been entitled to impugn the validity of the impugned decision under Article 16 (1) In the present case before me assuming that the impugned test imposed on the petitioners is hit by Article 16 (1), a non citizen auditor, (say of European descent), would not be able to avail of the

protection of that Article He would have to submit to test but not the petitioners

This would not be in accord with the policy underlying the provisions making non citizens eligible for public services and posts The Constitution must be read as a whole and care must be taken to avoid giving a meaning to one part which will be inconsistent with the policy underlying another part An intention to discriminate between citizen employees and non citizen employees would be inconsistent with a policy to make non citizens eligible for every service and post, (barring a few) under the Constitution This inconsistency is avoided if the meaning of the words matters relating to employment and appointment to office is confined to the stage when citizens are seeking employment

I shall now consider respectfully the authorities cited by learned counsel for the petitioners Mr *Dwivedi* relied on two cases in support of his contention that Article 16(1) is not limited to the stage of initial employment The first is a judgment of a Division Bench of Bombay High Court (TENDOLKAR and DESAI, JJ) in *Pandurang Kashinath More* v *Union of India* (1) The second is a decision of a Division Bench of Patna High Court (*Sukhanandan Thakur* v *State of Bihar*) (2) In the first case, it was held that the opportunity of equality in matters of employment enures for the benefit of the citizen not merely in case of his initial engagement but also in case of matters relating to the termination of that engagement The facts of that case were these The plaintiff Pandurang Kashinath More was engaged in 1944, as a mistry in the Bombay Telephone Workshop He was involved in a strike and was arrested in 1949 and detained under the Bombay Public Security Measures Act On 2nd July 1949, he was suspended from duty with effect from the date of his arrest and detention Thereafter on 29th March, 1950 he was served with an order terminating his services with effect from the date of his arrest On

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20th October 1950 he was released from detention and applied to the Manager of the Workshop for re instatement, which was refused He brought a suit in which he pleaded, *inter alia*, that the order of removal was in violation of Articles 14 and 16 of the Constitution inasmuch as the plaintiff was arbitrarily picked up and sacked

The Bombay High Court held that the words 'matters relating to employment meant that the purpose of Article 16 was to ensure similarity and equitable treatment in matters relating to initial engagement during continuance of that engagement and at the terminal end of that engagement To quote once again from the judgment of DESAI, J, The guarantee of equality embraces all matters of employment the Article in terms clear and ample speaks of all matters relating to employment and it is impossible to accede to the suggestion that what is contemplated by Article 16 is only the initial stage when the citizen is employed to serve the State Nothing so unfair and startling could have been than the contemplation of the framers of the Constitution The guarantee, in our judgment was intended to endure and not to be illusory For these reasons the learned Judges held that considerations of equality apply not merely at the initial stage, that is, where any citizen is engaged in service or appointed to any office by the State All along during the continuance of the engagement or office the citizen is assured of that equality of opportunity Here also there can be no discrimination between one employee and another on any ground of prejudice or bias or one which is extraneous

On the particular facts of the case, their Lordships held that the order terminating the services of the plaintiff was discriminatory and hit by Article 16 of the Constitution It set aside the decree of the lower court dismissing the employee s suit and granting him a declaration that the order of termination was void and illegal

In the Patna case there was a difference of opinion between the two learned Judges, who heard the case and,

on the usual reference to a third Judge, RAMASWAMI, J., held, (agreeing with AHMAD, J.), that the guarantee under Article 16 applies both to the case of appointment and termination of appointment. He took the view that unless the words of Article 16 were given a wider meaning the guarantee of equality of opportunity in matters of employment would be nullified. The facts of that case were these. The petitioner Sukhnandan Thakur was appointed as a Market Inspector in the Supply and Rationing Department on 7th August, 1946. On 9th December, 1947 his services were dispensed with as a measure of retrenchment. He was re-appointed as a Supply Inspector on 15th October 1948. He was holding this post on 27th February 1954 when he received an order from the District Magistrate of Muzaffarpur terminating his services with effect from the next date, 28th February 1954. It was admitted by the State that the order terminating his services was made in pursuance of and in accordance with the policy of the Government laid down in a circular issued on 23rd February, 1954. This circular contained elaborate provisions for carrying into effect the policy of retrenchment for reasons of economy. It stated *inter alia*, that the staff should be retained in order of seniority on the basis of their service records. But this principle was waived in favour of three classes of citizens:

(1) members of scheduled tribes and scheduled castes,

(2) displaced persons, and

(3) political sufferers.

The employees belonging to these three classes were to be retained on grounds of policy even if they were found to be junior in service. The petitioner took no objection to the exception in favour of the scheduled tribes and scheduled castes but he attacked the favour shown to political sufferers and displaced persons. He contended that as a result of this favourable consideration of these two classes of employees the petitioner, though fully qualified, competent and senior to many, had been

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retrenched while employees junior to him had been retained for no better reason than that they were either displaced persons or political sufferers But for this discrimination he would not have lost this job He therefore impugned the constitutionality of the Government circular which contained the exception in favour of displaced persons and political sufferers The petitioner relied upon Article 16 (1) for his attack on the aforesaid circular He contended that the guarantee of equality of opportunity in this clause prohibited discrimination even at the stage of termination of service It was argued that the expression employment to any office under the State includes in it the notion of continuity in employment and that therefore the rule of equality of opportunity is equally applicable to matters relating to termination of employment as well and that any distinction in the matter relating to an employment under the State not having a rational relation to the office amounts to discrimination and, therefore offends against the rule of equality of opportunity

In considering this argument AHMAD, J, examined the meaning of the word employment in Webster's Dictionary—(occupation, business that which engages the head or hands as agricultural employment or mechanical employment) The learned Judge thought that this meaning clearly suggested that the word employment referred to a condition in which a man is kept occupied in executing any work In other words it means not in appointment to any office for the first time but also the continuity of that appointment On the facts of the case, AHMAD, J, held that the exception to the rule of seniority in favour of displaced persons and political sufferers was on the face of it inconsistent with the guarantee of equality of opportunity in matters of employment contained in Article 16 (1) and (2) He was in favour of holding that the Government circular was void and that the petitioner must be deemed to have continued in service

DAS, C J disagreed But he steered clear of any discussion of the question whether the expression employment in clause 1 of Article 16 does or does not

mean continuity of employment because he considered such discussion unnecessary He took the view that the services of all the incumbents were terminated and fresh appointments were made Therefore, all the appointments were new He further held that in making the new appointments, certain selective principles were followed which were neither arbitrary nor unreasonable and were not in violation of Article 16 (1) He held that the aforesaid exception in favour of displaced persons and political sufferers did not violate the general principle of equality before the law guaranteed by Article 14 of the Constitution But he did observe that had he held the view that the classification of displaced persons and political sufferers was arbitrary and unreasonable then it would have been his duty to issue an appropriate writ in favour of the petitioner It is not clear whether he had in mind Articles 16 (1) or 14 when he made this observation

On a reference to the third Judge RAMASWAMI, J, held agreeing with AHMAD, J that the selective test imposed by Government was neither rational nor reasonable in so far as it showed a preference to displaced persons and political sufferers He did not accept the view of AHMAD, J that the word employment as used in Article 16 (1) included continuity in employment but he held that the word appointment' did To quote his exact words, with great respect I do not agree with the interpretation placed by AHMAD, J on the word employment in Article 16 though I agree for reasons which I shall presently state that the guarantee under Article 16 applies both to the case of appointment and termination of appointment In other words thus he concurred with AHMAD, J that the protection of Article 16 continued even after the stage of seeking employment though he gave his own reasons for reaching that conclusion His reasons are best stated in his own words

> My view is that the word appointment in Article 16 refers as a matter of necessary implication also to the termination of appointment

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otherwise the object of the guarantee given under Article 16 would be nullified For instance it would be open to the administrative authorities to make appointments to particular posts in conformity with the provision of Article 16 but on the very next day they may terminate the appointment of the candidates by applying the discriminatory tests prohibited by Article 16 (2)

Such a situation would be startling and unjust and could not have been intended by the Constitution makers I am of the view that the guarantee of equal opportunity under Article 16 (1) applies not only to appointment but also to termination of appointment Any other interpretation would render the protection given under Article 16 illusory

Thus whereas AHMAD, J based his argument on the word employment', RAMASWAMI, J, relied on the word appointment But they reached the same conclusion that the guarantee of equality under Article 16 (1) continues even beyond the initial stage of competition for employment and is not restricted to the initial act of employment by the State

In *Pandurang Kashinath More* v *Union of India* (1) the Bombay High Court, (TENDOLKAR and DESAI, JJ) took the view that the equality in matters of employment endures for the benefit of the citizen not merely in case of his initial engagement, but also in case of matters relating to the termination of that engagement Much of their argument is concerned with the question whether the special provisions of Article 310 relating to the services under the State displace the general provisions in Articles 14 and 16 relating to equality of opportunity But the interpretation of the language of Article 16 is very brief, the entire discussion being contained in the paragraph quoted by me in an earlier part of this judgment

(1) (1958) 60 Bom L R 342

Thus the learned Judges appear to have adopted the reasoning of the Patna High Court in *Sukhanandan* v *State* (1) that unless the word employment is made to include all the stages after the initial act of employment the guarantee of equality of opportunity will be rendered illusory I shall therefore consider with respect the judgment in the Patna case

In the Patna case AHMAD, J, attached decisive significance to the fact that the word employment is juxtaposed to the word appointment in Article 16 (1) To quote his exact words This implication (of wider meaning of the word employment) finds support from the wordings of Article 16 (1) itself Therein the expression used is employment or appointment It implies that the word employment means something different to what is meant by the word appointment I therefore, think that Mr *Amin Ahmad*, (counsel for the petitioner in that case), is right in contending that the word employment has in it an element of continuity of engagement which one enters upon when appointed to the office With respect, the expression used in Article 16 (1) is not employment or appointment but employment or appointment *to any office* Therefore the word employment was being used to mean something different from appointment to any office' It is well recognized that employment does not ordinarily include offices which are honorary or do not carry any salary Conversely, there can be employment which does not relate to any office For example casual labourers working on the Bhakra Nangal project are employed by the State but do not hold any office'

By including both employment and appointment to any office the Constitution has ensured that the obnoxious doctrine of a master race which disfigures the Constitutions of certain countries, shall find no place in India All citizens shall have an equal opportunity of serving the Republic either as paid employees or in other positions of responsibility, paid or unpaid To

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give an illustration, the office of President cannot be included in the phrase employment under the State but the makers of the Constitution wanted to ensure that every citizen of the Republic, whatever be his race creed or caste et cetera shall be entitled, equally with others to cherish the hope that he may one day be elected President The position under our Constitution contrasts with that under the (now defunct) Constitution of Pakistan which reserved the office of the President for Muslims This guarantee of equality has been made all embracing by including within its scope both employ ment' and apointment to any office under the State

The learned Judges in the Patna case attached con siderable importance to the word appointment With respect, the emphasis is not so much on the word appointment but on *office*" In some cases, appoint ment can be included in employment but appoint ment to certain *offices*, (particularly those which are honorary or elective), would not be For example, it may be said that *A B* was appointed a judge of the High Court on a certain date and that he has been employed as a judge since that day But it can not be said of a person who is elected President of a Municipal Board that he is employed as a President (He may be a lawyer or a doctor by profession) The guarantee of equality has been given a fuller content by the use of both the words employment and office This appears to be the true significance of the juxtaposition of the words employment and appointment to any office in this clause

In the same case RAMASWAMI, J, for reasons of his own agreed with AHMAD, J that the guarantee under Article 16 applies both to the case of appointment and termination of appointment' He pointed out that Article 16 makes a distinction between appointment" and employment He felt that the words employ ment and appointment' connote two different con ceptions To quote his own words, appointment ob viously refers to appointment to an office The term appointment therefore implies the conception of

tenure, duration emolument and duties and obligations fixed by law or by some rule having the force of law It is obvious that these elements are absent in the case of public employment which is a contract for temporary purposes For example labourers or experts engaged by Government for special professional tasks under bilateral contracts would belong to the category of persons in public employment On the contrary, persons appointed to any Government post or service are not usually employed under bilateral contracts—they simply work under conditions standardized by laws and regulations

With deep respect, I am unable to agree that the word appointment necessarily implies the conception of tenure duration emolument, etc I have already pointed out that the words appointment to any office are meant to include certain offices which would not ordinarily be covered by the word employment I have pointed out that certain offices though honorary or unpaid may be highly coveted by every citizen The office of Chairman of a Municipal Corporation or Honorary Surgeon to the President or Poet Laureate (if ever it is created) may or may not carry any salary or emoluments but they are offices of status and dignity The term appointment when applied to the office of a Chairman of a Municipal Corporation cannot possibly imply the conception of emoluments which is one of the conceptions mentioned by the learned Judge I can only repeat my respectful suggestion that the purpose of adding the words appointment to any office' is to ensure that every citizen shall have an equal opportunity not only when he seeks a State job for his livelihood but also when he aspires for any office of position or honour or dignity under the State The content of the freedom or equality conferred by Article 16 as indeed by Part III itself is partly economic partly social and partly spiritual A few observations on the nature of fundamental rights guaranteed by the Constitution will not be out of place

Chapter III relating to fundamental rights enumerates not merely economic rights, but various other kinds

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of rights which were considered necessary by the founders of the Constitution, (if I may borrow an observation of Mr Justice SAPRU in an Allahabad case), to give a full and concrete content to the freedom of human personality in all its aspects The freedom of speech and expression, the freedom of conscience and the freedom to profess practice and propagate religion have no economic content whatsoever but they were considered necessary for the blossoming of individual personality The content of Chapter III is partly economic partly political and partly spiritual Article 16 too has a content which is partly economic and partly social and spiritual It guarantees that every citizen shall have an equal opportunity to seek employment under the State To this extent its content is economic It also guarantees that no citizen however humble his status and whatever his religion, race, caste sex or place of birth shall be ineligible for any office (including the highest) under the Republic It repudiates the doctrine of a master race and bans the classification of citizens into a superior class which can be entrusted with position of responsibility and an inferior class which must remain content with a position similar to that of Jews in Hitlarite Germany or Boer dominated South Africa In a word it ensures that no citizen shall be branded with the stamp of inferiority or ineligibility, but that every citizen shall hold his head high and walk the soil of his country with dignity To this extent Article 16 has a social and spiritual content This appears to me to be the true significance of mentioning both employment and appointment to any office in this Article

It must not however be understood to mean that the phrase appointment to any office under the State relates only to honorary or unpaid offices and completely excludes every office carrying a salary or emoluments As an illustration the leader of a political party commanding a majority in the Parliament and aspiring to be selected by the President as Prime Minister can hardly be considered as seeking employment If he is selected as Prime Minister, he will be deemed to be appointed to

an office under the State, though his post carries with it a salary But the guarantee of equality contained in the phrase appointment to any office under the State extends to this office and enjoins that every citizen shall be eligible for the post of Prime Minister regardless of his race, creed, et cetera, if he is the leader of a party or group commanding a majority in the Legislature

RAMASWAMI, J, advanced an additional reason for the argument that the word appointment in Article 16 refers as a matter of necessary implication also to the termination of appointment If it did not be argued, the object of the guarantee given under Article 16 would be nullified the learned Judge gave an illustration to back this argument For instance he observed it would be open to the administrative authorities to make appointment to particular posts in conformity with the provision of Article 16, but on the very next day they may terminate the appointment of the candidates by applying the discriminatory tests prohibited by Article 16 (2) In other words the learned Judge feared that unless the guarantee of equality continues to protect a citizen even after he has become a State employee the State may defer this guarantee by giving a job with one hand and taking it away with the other With respect there are two answers to this argument which was also raised in a more sinister form by Mr *Dwivedi*

First it is not quite correct that the object of the guarantee under Article 16 would be nullified if the words employment and appointment to office are restricted to the initial stage of making the appointment AHMAD, J relied on the hypothetical case where Government makes the appointment to day and terminates it to morrow on grounds prohibited by Article 16 (2) With great respect, I suggest that the employee would not be without remedy If his appointment is terminated on account of religious bigotry racial prejudice casteism or provincialism or sex, it would be hit by Article 15 (1) Moreover the power under Article 310 must be exercised *bona fide* A *mala fide* exercise or patent abuse of the power of removal would be illegal

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The removal for improper reasons, of an employee who was appointed only yesterday would obviously be a *mala fide* exercise of the power under Article 310 but *even by Article* 16 (1) The aggrieved employee could maintain an action on the ground that his appointment and removal were a continuous act and that, *in fact*, he had been deprived of the guarantee of equality of opportunity for employment as what was given with one hand was simultaneously taken away with the other On proper proof of fact the court would hold that the authority never had any intention of giving him an equal opportunity under Article 16 (1) from the very beginning and he got none It is not quite correct therefore, that the guarantee of equality of opportunity under Article 16 (1) would be nullified or rendered illusory if the words employment and appointment to any office are restricted to the initial stage of employment Mr *Dwivedi's* argument goes a little deeper He contended that unless the words employment and appointment include the stage beyond the initial appointment and unless the employee is shielded against discrimination in such matters as promotion and termination of service, the guarantee of equality of opportunity will be rendered futile against a Government which is determined to discriminate against or victimize a certain class Mr *Dwivedi* too like AHMAD, J, cited a hypothetical illustration Suppose, he said, ten years from now a party *J* comes to power on a programme and policy directed against a particular class *M* and a *J* Ministry directs all the services to be purged of all *Ms* or that no *M* shall be promoted to key posts In that situation unless words in matters relating to employment include the stage beyond the initial appointment, such a Government will succeed in rendering the guarantee of equality in Article 16 (1) illusory I have quoted learned counsel almost word for word Mr *Dwivedi's* illustration is of a more sinister import and deserves serious notice

The ultimate strength of a Constitution lies not so much in the excellence or perfection of the language of

the constitutional document, but in the willingness of the people to accept and promote the principles underlying it The foundation of every Constitution is its political, social and spiritual philosophy on which is raised the entire edifice of the Constitution This philosophy dominates every part of the Constitution The social political and spiritual foundations of the Indian Constitution are laid in its Preamble and partly also in the Directive Principles of State Policy which have been declared by Article 37 to be fundamental in the governance of the country The significance has been explained in many judgments of the Supreme Court and of other High Courts and it is hardly necessary for me to add anything to them But it is beyond dispute that the principles of secular political and social democracy and of liberty equality and fraternity on which our Constitution is founded are the complete negation of the hypothetical programme of the hypothetic party *J* in Mr *Dwivedi's* illustrations

Mr *Dwivedi* asks me to visualize the situation after such a party with such a programme is elected and assumed power I have no doubt in mind what the situation will be A constitution derives its strength and nourishment from the loyalty and support of the people If at any time it loses this support it shall decay and wither however excellent may be its draft It was said of the Weimar Constitution of Germany that it contained the most perfect and the most elaborate safeguard for the freedom of the individual ever devised by the genius of jurists But when the German people voted Hitler into power in an election it disowned by its verdict, the foundations of the Weimar Constitution in favour of Nazism So if the party mentioned by Mr *Dwivedi*, with a programme outlined by him is voted into power in India in a general election, it must be assumed that the people of India have withdrawn its support and loyalty from Constitution A constitution bereft of the allegiance of the people is like a body after the vital spark of life has left it From a living organism it becomes a corpse though all its parts are intact If

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this ever happens to our Constitution no safeguards in Article 16 or any other provision can prevent Mr *Dawedi's* hypothetical party from carrying out its programme any more than a foreign army can be prevented from invading India by the Municipal bye laws of Amritsar

Secondly, the appointment of a person to a post and his subsequent removal are two different categories of State acts and each has been made subject of different conditions under the Constitution A citizen seeking employment under the State and a citizen in the employ of the State are in different positions At the State employment citizens compete with each other under a guarantee of equality of opportunity But after appointment the successful citizen joins the ranks of Government servants under the control and discipline of the State He even surrenders some of his fundamental rights He is no longer entitled to freedom of expression, nor can he purchase or sell property exceeding a specified value without the permission of the State He accepts service on the understanding that his tenure of office is at the pleasure of the State Article 310 invests the State with absolute control over the tenure of every State servant (subject to the safeguards contained in Article 311) This wide power was conferred on the State by the founders of the Constitution in their wisdom and for reasons of sound public policy They adopted the British principle (subject to the safeguard of Article 311), under which the Crown can remove any servant at pleasure This was no idle provision inserted in a light hearted manner by persons who did not realise its implications The Fathers of the Constitution devoted a special chapter to the services under the Union and the State Article 310 was woven into the fabric of the Constitution They could have followed other constitutions under which the State servants have been granted rights against the State But, with their eyes open they adopted the maxim *durante bene placito*, (with safeguards under which the Crown can remove any servant at pleasure They made it the most important pillar of

Chapter XIV, the pillar on which rests the State s control and power of discipline over its servants Why? Presumably because they realized that in the peculiar conditions of India, the interests of discipline and efficiency required that every State servant must know his place when he is talking to the State so to speak They wanted every State employee to realize that the State is the master who holds the whip in hand and that though the whip would be seldom used and on the contrary the State in India would treat its servants generously in its bounteous liberality, the whip hand must always be there This appears to be the purpose for which Article 310 invested the State with arbitrary powers over its employees

Of course, they provided constitutional safeguards against any unconstitutional abuse of the power under Article 310 Articles 14 and 15 (1) ensure that the power under Article 310 will not be used in a discriminatory manner or to undermine the social democratic foundation of the State, or to introduce racialism provincialism or casteism or bigotry in recruitment to State services or to weed out a whole class of community from State service But within the limits of these effective safeguards, they intended the power under Article 310 to be really effective in the day to day administration of the State in matters relating to promotion selection for higher posts and termination of service The employees were deprived by the Constitution of any legal remedy for their grievances

These considerations must be borne in mind in determining the scope and area of the word employment in Article 16 (1) Was it intended to place the executive under judicial control in matters which concern the day to day administration? Was Article 16 intended to compel the State, in spite of Article 310, to render an explanation each time when an individual employee claims that he should have been promoted instead of the other fellow ? My answer would be no

In determining the meaning of the words matters relating to employment in Article 16 (1), care must be

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taken not to upset the delicate balance between the guarantees under Part III and the wide powers of the State under Article 310. AGARWALA J. took the extreme view that Article 310 was not subject to any control of Article 14. With respect, he did not consider that Articles 14 and 15 are safeguards against such abuses as racialism, provincialism, casteism or religious bigotry in the matter of termination of service. On the other hand the learned Judges of the Bombay and Patna High Courts took the other extreme view that equality of opportunity must extend even beyond the stage of initial appointment to such matters as promotion, selection for higher posts, retrenchment, termination of service and so on. With respect, such a wide interpretation of the words "matters relating to employment" will throw the doors wide open to interference with the executive in the day-to-day administration of the State. As was observed by Lord ROCHE in *R. Venkata Rao* v. *Secretary of State* (1) control by the Courts over Government in the most detailed work of managing services would cause not merely inconvenience but confusion. This observation was quoted with approval by KAPUR, J. in *Punjab State* v. *Bhagat Singh* (2) in which the learned Judge dismissed the suit of a police official for a declaration that his dismissal was illegal and void.

In practice the problem of adjusting the respective spheres of Articles 310 and 14 will require much common sense and practical wisdom. A power which is absolute in its own sphere has to be reconciled with an injunction which is transcendant. Abstract logic may demand that the two provisions are in conflict and cannot be reconciled and that either one must absolutely control the other or the other made absolutely independent of the first. But constitutional problems are not solved like mathematical equations, for they are part of the problems of social life which do not conform to any mathematical formulae or rigid logic. The interpretation of the constitutional law of a people living under an old and complex civilization like ours demands, when solving

(1) A.I.R. 1937 P.C. 3 (2) A.I.R. 1955 Punj. 118

problems like the present, compromises, skilful adjustments which may not be strictly logical but which will make the Constitution workable Social life, which creates problems of constitutional law, is infinitely richer and more complex than abstract and empty logic A page of history is worth a volume of logic, said Mr Justice OLIVER WENDEL HOLMES in *New York Trust Co v Eisner* (1) He observed on another occasion, the life of the law has not been logic it has been experience

In the light of the principles of interpretations discussed above and taking into consideration the language of Article 16, read together with the other provisions of the Constitution I hold, respectfully disagreeing with the two Division Benches of the Patna and Bombay High Courts respectively, that the guarantee of equality of opportunity for citizens under Article 16 (1) of the Constitution in matters relating to employment or appointment to any office under the State is confined to the stage when the citizen is seeking employment or competing for any post and has no application to matters arising after the citizen has joined service—such as promotion, selection for higher posts increase or reduction of salary retrenchment or termination of service I also hold respectfully dissenting from the view of AGARWALA and RANDHIR SINGH, JJ in *Raj Kishore v State of U P* (2) and following what I believe to be the view of the Supreme Court that Part III of the Constitution relating to fundamental rights transcends and controls within its own orbit every power under the Constitution and there are no exemptions except those specified in the Constitution itself Accordingly, an employee who has been denied equality before the law or the equal protection of the laws can appeal to Article 14, and if the State has discriminated against him for motives of religion, bigotry, racialism casteism provincialism or on the ground of sex evils expressly banned by Article 15 he can invoke the protection of that Article

(1) 256 U S 345 65 L Ed 963 (2) A I R 1954 All 343

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I therefore hold that, in the present case the petitioners are not entitled to invoke Article 16 (1) but the contention based on Article 14 is open to them

I shall now examine on merits the grievance of the petitioners that the imposition of a test on them, while exempting the Cane Auditors amounts to discrimination

It is stated in the counter affidavit of the State that the General Section is a much larger department than the Cane Section It handles work which requires much greater knowledge and skill in auditing than in the other section It affords to its employees much better chances of promotion than the Cane Auditors For example, any of the existing Auditors may one day be promoted a Senior Auditor or a Regional Auditor or even a Deputy Chief Auditing Officer or Chief Auditing Officer The new entrants to this section possessing a Bachelor's Degree would of course, be entitled to all the chances of promotion in this department, but the problem has been created by the existence of a number of old Auditors whose educational background is somewhat low They too have been made eligible for climbing all the steps of the ladder of promotion But in consideration of this privilege, the Government have asked them to undergo a departmental examination I fail to see the injustice in this demand

As stated above learned counsel conceded that the imposition of test as such is not considered objectionable by the petitioners but they resent the exemption granted to the Cane Auditors Mr *Dwivedi* frankly admitted that if the same test had been imposed on the Cane Auditors as well he would have no case to argue Therefore it is not really the test but the exemption which is in issue I have therefore to consider whether the exemption in favour of the Cane Auditors is justified or not and if not, whether the petitioners can make a grievance of it

It is stated in the counter affidavit of the State that the Cane Auditors audit the accounts of Cane Unions which does not require the same degree of knowledge

and skill as the auditing of General Co operative institutions which are under the charge of General Auditors It is further stated that Cane Auditors hardly have any scope for promotion in their section In other words, they are not likely to be called upon to fill posts of responsibility or undertake work of skill during their service It was therefore not considered necessary to impose a similar test for the Cane Auditors Mr *Dwivedi* contended on the other hand that the test was not being imposed on the Auditors in the General Section as a condition of promotion but as a condition for receiving higher scale of pay He pointed out that their work would continue to be the same whether they pass the test or not The only difference as a result of the test will be that some will receive a higher salary than others He therefore argued that there was no reasonable connection between the classification and the object sought to be achieved

Let us consider the validity of the test as if the Cane Auditors never existed The Government would be justified in imposing a test on the old Auditors in the General Section in consideration of the benefits conferred upon them to which they are not entitled by right If they are placed in the same scale of pay as the new entrants any distinction between the old and the new will be obliterated In the future both classes will have the same opportunities of rising to the highest posts in their section This is a concession to which they were admittedly not entitled by right Government could have left them in their old scales of pay but they were generous enough not to take their stand on strict legal rights and obligations and extended to them this impressive concession In return for this, is not Government entitled to impose a condition that the new benefit will be enjoyed only after passing a test ? I think it is If the petitioners dislike the condition, they can reject the Government s offer and continue in the old scale of pay

Learned counsel contended that the petitioner did not object to the imposition of the test but to the exemption granted to a class of Auditors without any

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justification He emphasized that the two sections of the auditors had identical responsibilities which required the same degree of skill The Government had exempted one section from the test without any reason whatsoever I am not at all impressed by this grievance Who is to judge whether the responsibilities of the two classes of auditors are identical or not? Obviously, the ultimate judge is the Government which runs both sections They have intimate knowledge of the day to day working of each section and of its requirements They are of the opinion that the working and auditing in the General Section is more difficult and complicated and requires a higher degree of skill This Court cannot enquire into the correctness or soundness of their decision Even if the decision had been wrong and I think it is not, this Court would have no justification to sit in enquiry or judgment upon a decision made in the exercise of a power which is within the exclusive sphere of the executive branch of the State Government have decided to confer a benefit upon the Auditors of both sections to which neither class was entitled by right It will have the result of placing the petitioners on a par with the better qualified auditors to be recruited in the future Government feels that the work of the General Auditors is more difficult and they will be better equipped to discharge their heavier responsibilities if they pass a test This Court has no jurisdiction to interfere with a decision of the executive of this kind

The real nature of their resentment is of a negative character the target of this petition is not the test imposed on them but the exemption in favour of others That being so, this petition appears to be misconceived Assuming for the sake of discussion that Government have made a mistake of judgment while imposing a test on the General Auditors in exempting the Cane Auditors who should also have been tested, what is the precise nature of this mistake? It does not lie in imposing a test on the General Auditors which the Government considered necessary in their case and which they had the undisputed right to impose on the petitioners in con

sideration of giving them the new scales of pay to which they were not entitled The starting point of any argument in the present controversy must be that Government s decision to impose a test on the General Auditors was correct The error if any must be *in exempting the Cane Auditors, though a test was equally necessary in their case* The real grievance of the petitioners is that an exemption was wrongfully granted to the Cane Auditors Even if that be so what relief can be granted to the petitioners? I am afraid none

Even if the Court had held that the exemption was unjustified no relief could be claimed by the petitioners They could not claim exemption from a test which is necessary in their case at any rate Nor can they ask this Court to compel the Government to impose the test on the Cane Auditors as this would be beyond the jurisdiction of the Court whose power to issue a writ of mandamus is limited to the enforcement of legal duties or obligations There is no duty imposed by law or statute on the Government to impose a test which it does not want to This petition appears to me therefore to be misconceived A citizen may invoke Article 226 for the protection of his own rights but not to prevent any other citizen from obtaining something to which he was allegedly not entitled (Cases of *quo warranto* and *habeas corpus* are exceptions)

The petitioners have however invoked Articles 14 and 16 and claimed exemption from the test in the name of equality of opportunity They do not say that the test was unjustified But they contend that the exemption in favour of the Cane Auditors was wrongful and as one section has been exempted they are entitled to a similar exemption Thus they have adopted a position somewhat similar to that of a candidate in an examination who does not obtain pass marks, but says As the other fellow has been declared successful, so must I be This is an untenable demand on the face of it The petitioners appeal to the principle of equality under Articles 14 and 16 has been made with the object of dressing up this petition with the cloak of constitutional respectability

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I hold that the action of the Government in imposing a test on the General Auditors while exempting the Cane Auditors, was not discriminatory

The State raised a preliminary objection that a joint petition containing a prayer for mandamus could not be filed on behalf of 35 petitioners There is some force in this objection, but I decided to hear the entire case on merits in view of the far reaching importance of the issues raised If the petitioners had filed separate petitions they would have been taxed to costs separately It is in the interests of justice that each petitioner should pay the costs which he would have paid under a separate petition particularly in view of the fact that the hearing of the petition lasted several days

The petition is dismissed The petitioners shall pay to the respondents costs calculated at the rate of Rs 5 per each petitioner

Mr *Brij Lal Gupta* and Mr *S C Khare*, appeared for some petitioners in the other connected petitions Mr *Gupta* stated that he adopted the arguments of Mr *Dwivedi* Mr *Khare* addressed me for a short time and gave general support to Mr *Dwivedi's* argument Mr *Laxmi Saran*, on behalf of the State mainly relied on the judgment of AGARWALA, J in *Raj Kishore's* case (1) and also contended that Article 16 (1) did not extend beyond the stage of initial employment

Petition dismissed.

(1) A I R 1954 All 543

CIVIL REFERENCE

Before the Honourable O H Mootham, Chief Justice and Mr Justice Dayal

TIKA RAM (PLAINTIFF)

v

MAHESHWARI DIN AND OTHERS (DEFENDANTS)

1959
February 23

Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 *s* 332 *B, sub ss* (2) *and* (3)—*Issue remitted—Jurisdiction—Collector must decide—Civil Procedure Code* 1908 *s* 115—*Reference when competent*

A Collector or an Assistant Collector has no jurisdiction to sit in judgment on the view of the civil court remitting an issue to the Collector and has to decide that issue in accordance with the provisions of sub ss (2) and (3) of *s* 332 *B* of the Uttar Pradesh Zamindari Abolition and Land Reforms Act

An opinion under *s* 115 Civil Procedure Code is to be sought when the court itself feels some doubts about the question and not when the court has formed an opinion and acted upon it and that opinion is disagreed with by another court

Faindhan Singh v Gaya Prasad (1) dissented from

Civil Reference No 28 of 1958 made by R C Awasthi the Munsif, Hamirpur, in Original Suit No 81 of 1955 by an order dated 15th January 1958

The facts appear in the judgment

Standing Counsel (*N D Pant*) for opposite parties

The judgment of the court was delivered by—

DAYAL, J —Original Suit no 81 of 1955 for partition and possession was instituted in the court of Munsif Hamirpur on the 16th of February 1955 One of the issues framed in the suit was whether the plaintiff is co *sirdar* of the land in suit along with defendants 1 and 2 ? On the 24th November 1956 this issue was remitted to the Collector Jalaun, for a finding in view of the provisions of section 332 B of the U P Zamindari Abolition and Land Reforms Act, 1950 as amended by section 19 of the U P Land Reforms (Amendment) Act (XVIII of 1956)

The Collector Jalaun transferred the case for disposal to the court of Sri Nem Chandra Jain, Assistant

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Collector First Class On the 28th June 1957, Sri Jain returned the record without any finding on the issue referred to the court of the Munsif holding that the reference was without jurisdiction and any decision of the issue by him would be without jurisdiction

The Munsif Hamirpur, thereafter made this reference to this Court under section 113 of the Code of Civil Procedure

When this reference came for hearing before us we considered the real grievance of the Munsif to be that Sri Jain the Assistant Collector, has not performed the statutory duty to decide an issue referred to the Collector under section 332 B of the Act and that he should be made to perform this duty by the issue of proper directions to him No reference under section 113 of the Code of Civil Procedure could be maintainable in the circumstances of this case Under section 113 Civil Procedure Code a court can state a case and refer the same for the opinion of the High Court Such an opinion is to be sought when the court itself feels some doubts about the question and not when the court has formed an opinion and acted upon it and that opinion is disagreed with by another court We therefore issued notice to the Collector and the Assistant Collector to show cause if any against the passing of such orders as the Court considered just in the circumstances of the case

Sri Jain in his letter sent through the Additional Collector and Additional District Magistrate (Judl) Jalaun, has tried to show that the opinion that he formed about the jurisdiction of the Munsif to have referred that issue to the Collector was correct and has also said

if it is not within the jurisdiction of a court to decide a particular issue referred by another court then certainly the court has a right to send back the file without deciding that issue with reasons In adopting such a course it cannot be said that the court to which an issue had been referred failed to perform any statutory duty In support of this expression of opinion he has

made a reference to the case of *Parsidhdhan Singh* v *Gaya Prasad* (1)

The Additional Collector, Jalaun, has stated in his letter that the record of the civil court was returned to the remitting court as the order of Sri Jain was a judicial order and therefore could be set aside in judicial proceedings or by the High Court on a reference by the learned Munsif and that in an administrative capacity he could not have intervened in the matter

We do not consider it necessary for the purposes of these proceedings to decide the question whether a reference of the issue by the Munsif to the Collector was correct in law or not as we are of opinion that the view of the learned Munsif on the question would be subject to attack on an appeal from his decree in the suit and that the Collector or the Assistant Collector was not competent to question the correctness of the view of the Munsif who had remitted the issue to the Collector for decision

The Collector had no general jurisdiction over the subject matter of dispute between the parties His jurisdiction was limited to the decision of the issue referred in view of the provisions of section 332 B (1) of the Act which as it stood on the 24th November 1956, read thus

> 332 B (1) If in any suit relating to land instituted after the commencement of the U P Land Reforms (Amendment) Act 1954 in a civil court or if instituted before the said commencement a decree had not already been passed the question arises or is raised whether any party to the suit is or on any material date was a *sirdar, adhivasi* or *asami* of the land and such question has not previously been determined by a court of competent jurisdiction the civil court shall frame an issue on the question and submit the record to the Collector for the decision of that issue only
>
> *Explanation*—A plea of being a *sirdar, adhivasi* or *asami* which is clearly untenable and intended

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Dayal J.

only to oust the jurisdiction of the civil court shall not be deemed to raise a question as aforesaid

(2) The Collector after re framing the issue, if necessary, shall decide such issue only, and return the record together with his finding thereon to the civil court which submitted it

(3) The Collector may instead of deciding the issue himself transfer it to a competent subordinate revenue court which shall after re framing the same if necessary, decide it and return the record with its finding thereon through the Collector to the civil court

(4) The civil court shall then proceed to decide the suit accepting the finding of the Collector or the subordinate revenue court on the issue referred to it

(5) The finding of the Collector or subordinate revenue court on the issues referred to it shall for the purposes of appeal, be deemed to be part of the finding of the civil court

This section lays down a particular procedure to follow when a plea of *sirdari asami* or *adhivasi* rights is raised in a civil court It is for the civil court to decide whether it had to refer an issue to the Collector or not Its view may be wrong, but the Collector gets jurisdiction to decide the issue referred in view of sub-section (2) of section 332 B of the Act He has no option but to decide the issue and return the record with his finding to the civil court Of course he can re frame the issue if necessary The civil court has no option to ignore the finding of the Collector It has to accept it and to decide the suit accepting that finding Further, such a finding of the Collector is deemed to be part of the finding of the civil court in view of sub-section (5) of section 332 B of the Act We are therefore of opinion that the Collector or the Assistant Collector had no jurisdiction to sit in judgment on the view of the civil court remitting the issue to the Collector and had to decide that issue in accordance with the provisions of sub-sections (2) and (3) of section 332 B of the Act

For the reasons stated above, we with respect, do not agree with the view expressed by Mr Justice V D BHARGAVA in *Parsidhan Singh* v *Gaya Prasad* (1) referred to by the Assistant Collector in support of his view That case came to this Court in a revision under section 115 Civil Procedure Code and the learned Judge held that no application lay under that section He however proceeded to express his opinion on the merits and held that the question of *adhiwasi* right ceased to be a question of title during the pendency of the remitted issue in the civil court on the promulgation of the U P Land Reforms (Amendment) Ordinance, 1954 in view of its section 5 The jurisdiction of the civil court under section 332 of the Act was not to decide any question of title but was to decide an issue referred to it by the revenue court and this jurisdiction did not cease by a subsequent provision that a question of *adhiwasi* right ceased to be a question of title

We therefore set aside the order of Sri Jain dated the 28th of June 1957 and direct that the record of the case be sent to the Collector Jalaun for the decision of the aforesaid issue We make it clear that he will be competent to make it over for decision to an Assistant Collector, First Class.

Reference accepted

(1) 1955 A L J 628

APPELLATE CIVIL

*Before Mr Justice Beg and Mr Justice V D Bhargava**

ABIDA BEGAM AND OTHERS (PLAINTIFFS)

v

1959

March 23

RENT CONTROL AND EVICTION OFFICER LUCKNOW AND OTHERS (DEFENDANTS)

Landlord and Tenant—*Allotment of a portion of a house—Consent of the landlord—Need of the landlord—No enquiry into the bona fide of the need—Order of the Rent Control and Eviction Officer validity of—Rules 6 and 7 under the Rent Control and Eviction Act, 1947 applicability of—Civil Procedure Code 1908 s 80—Notice to the Rent Control and Eviction Officer scope of—Writ jurisdiction scope of*

The plaintiff appellant is the owner of a house of which the room in dispute is a part On 15th August 1950 the plaintiff got possession of this room in execution of a decree for ejectment against Nand Kishore a tenant On 14th August 1950 the plaintiff informed the Rent Control and Eviction Officer that he needed this room and prayed that it may be released to him One Shyam Sunder applied to the Rent Control and Eviction Officer that the room be allotted to Ram Khelawan for starting a betel shop The Rent Control and Eviction Officer asked the landlord for particulars On 16th August 1950 the plaintiff supplied the particulars and again prayed that he genuinely needed the accommodation for his personal use and it should be allotted to him On 19th August 1950 the room was allotted to Ram Khelawan without any evidence having been taken for the need of the plaintiff On 24th August 1950 the plaintiff was informed of the order of 19th August 1950 On 25th August, 1950 the plaintiff filed a suit for injunction restraining the defendant no 2 Ram Khelawan from obtaining possession of the room in dispute under the allotment order passed in his favour by the Rent Control and Eviction Officer and an order of permanent injunction restraining the Rent Control and Eviction Officer the defendant no 1 from enforcing the order of allotment The defence of defendant no 1 was that the suit is barred for want of notice under s 80 Civil Procedure Code and is also barred under ss 15 and 16 of the United Provinces Control of Rent and Eviction Act that the allotment order has been validly passed in favour of defendant no 2 and that the plaintiff has no cause of action against the defendant no 1 The defendant no 2 did not file any written statement The [illegible] dismissed by the trial court and the lower appellate

*Sitting at Lucknow

court also dismissed the appeal and the learned single Judge also held that the suit was barred A special appeal is filed

Held, (i) that there is nothing on the record to show that the Rent Control and Eviction Officer ever cared to enquire into *bona fides* of the needs of the landlord nor did he issue a notice to the landlord when only one of the rooms of the house had fallen vacant Hence the order of the Rent Control and Eviction Officer has been passed without compliance of the rules framed under the Act

(ii) That the right of the plaintiff to occupy the house was a valuable right If he needed it *bona fide* he had under the rules a right to allotment in his favour for that purpose a notice was absolutely necessary which was not given to him. Secondly as required by rule 7 no enquiry was made from him about the desirability of the tenant

(iii) That where an order is to be passed under rules 4 6 or 7 then in that event since the proceedings are of a quasi judicial nature the order itself would be of a quasi judicial nature and if the provisions of the Act are not followed or even if the principles of natural justice are not followed the order would not be sustainable

Ram Narain Tewari v *Ram Chandra Sharma* (1)

Chandra Bhan v *Rent Control and Eviction Officer Agra* (2) relied on

(iv) that since the disputed room is in a portion of the house wherein the appellants are themselves living they would be most reluctant to have that kind of shop in their house where all sorts of undesirable people might visit and under the circumstances the allotment order is bad in law

Bhakat Shiromani v *Rent Control and Eviction Officer* (3) relied on

(v) that there cannot be the least doubt that the order of allotment has been made without the consent of the landlord and hence the order is bad in law

Prem Narain Tayal v *Girish Chandra Khare* (4) relied on

(vi) that it has been so often decided as to have become almost an axiom that in public statutes words only directory permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in the advancement of public justice

(1) 1953 A L J 83
(2) 1953 A L J 440
(3) 1953 A L J 653
(4) 1954 A L J 62

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SMT. ASHA BEGAM v. RENT CONTROL AND EVICTION OFFICER, LUCKNOW

Reg v. *Tithe Commissioners* (1)

Frederic Guilder Julius v. *The Lord Bishop of Oxford* (2)

State of U. P. v. *Manbodhan Lal Srivastava* (3) relied on

(vii) That the order of the Rent Control and Eviction Officer cannot be supported as it is in direct breach of rules 6 and 7 of the Act

(viii) That the suit is not barred under ss. 13 and 16 of the U. P. Control of Rent and Eviction Act

Ram Chandra v. *The District Magistrate of Aligarh* (4) relied on

Secretary of State v. *Mask and Co.* (5) followed

(ix) that so far as the defendant no. 1 is concerned no relief can be granted in the suit itself as notice under s. 80 Civil Procedure Code was not given but as against defendant no. 2 he would be restrained from taking possession of the premises under the allotment order which has been passed

Bhagchand v. *Secretary of State* (6) relied on

(x) that although it may not be possible for this Court to grant a decree in the suit but this Court has a jurisdiction under Art. 226 of the Constitution to grant the relief as against the defendant no. 1 even though this matter has not come in its writ jurisdiction on application under Art. 226 because if in the office of the Rent Control and Eviction Officer the allotment order continues in favour of defendant no. 2 who is restrained from taking possession there is likely to be a conflict and it may be difficult for the Rent Control and Eviction Officer to have any further allotment order

Special Appeal no. 15 of 1957 against the decision of MEHROTRA, J. dated 26th April, 1957

The facts appear in the judgment

Rameshwar Dayal for the appellant

Junior Standing Counsel and *K. S. Varma* for the respondent

The judgment of the Court was delivered by—

V. D. BHARGAVA, J.:—This is a special appeal against the decision of a learned single Judge of this Court in a second appeal filed by the plaintiff who had filed a suit for injunction restraining the defendant no. 2, Ram

(1) L.R. 1 (1849) 14 Q.B. 459
(2) L.R. (1879-80) 5 A.C. 214
(3) A.I.R. 1957 S.C. 912
(4) 1952 A.L.J. 114
(5) A.I.R. 1940 P.C. 105
(6) (1926-27) L.R. 54 I.A. 338

Khelawan from obtaining possession of the room in dispute under an allotment order passed in his favour by the Rent Control and Eviction Officer, Lucknow, and an order of permanent injunction restraining the Rent Control and Eviction Officer, defendant no 1 from enforcing the order of allotment in favour of Ram Khelawan

The suit was dismissed by both the courts below as well as by the learned single Judge Hence this special appeal

The plaintiff Abban Saheb came on the allegation that he was the owner of a certain house of which the room in dispute was a part He was in occupation of the entire house except this room It had previously been let out to one Nand Kishore about 12 or 13 years back from the date of the suit After some protracted litigation the appellant was able to get a decree of ejectment as against Nand Kishore and after execution of the decree he obtained actual possession of the room on 15th August, 1950

On the next day i e on August 14 1950 the plaintiff informed the Rent Control and Eviction Officer of the vacancy and prayed that the room should be released in his favour as he required it for his own needs It is contended that one Shyam Sunder made on the same day an application that there was a boy Ram Khelawan whom Shyam Sunder knew, and therefore he requested the District Magistrate that the room should be allotted to Ram Khelawan because Ram Khelawan wanted to start a betel shop On the same day the Rent Control and Eviction Officer asked the landlord to supply the particulars of the accommodation

On August 16 1950 the plaintiff supplied the particulars and again made a request that he genuinely needed the accommodation for his personal use and it should be allotted to him Thereafter, according to the plaintiff he was never asked to produce any evidence about the *bona fide* needs of the plaintiff, but, on the other hand on August 19 1950, the room was allotted to Ram Khelawan and on August 24, 1950, intimation to this

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effect was communicated to the plaintiff. The plaintiff on the next day, that is August 25, 1950, filed the suit.

On behalf of the defendant no. 1 the Rent Control and Eviction Officer it was contended that he had acted on behalf of the Executive Government and the suit was not maintainable for want of notice under section 80 Civil Procedure Code that the suit was barred under sections 13 and 16 of the U. P. Control of Rent and Eviction Act (Act III of 1947) that the allotment order had been validly passed in favour of the defendant no. 2 when the accommodation fell vacant and the plaintiff had no cause of action against defendant no. 1. Defendant no. 2 did not file any written statement though he was present throughout the proceedings. The trial court and the lower appellate court held that the suit was bad for want of notice as against defendant no. 1 and the first two courts as well as the learned single Judge have held that the suit was barred under section 16 of the U. P. Control of Rent and Eviction Act.

In appeal it has been contended that the order passed by the courts below was in direct defiance and in breach of the rules made under the U. P. Rent Control and Eviction Act which were binding upon the Rent Control Officer. Particular reliance was placed on rules 6 and 7 made under the Act which are as follows:

> 6. *Occupation by landlord*—When the District Magistrate is satisfied that an accommodation which has fallen vacant or is likely to fall vacant is *bona fide* needed by the landlord for his own personal occupation the District Magistrate may permit the landlord to occupy it himself.
>
> 7. *Allotment of a portion of accommodation*—Where a portion of accommodation falls vacant and the owner is in occupation of another portion thereof the District Magistrate shall before making the allotment order consult the owner and shall so far as possible make the allotment in accordance with the wishes of the owner."

It was argued that so far as the effect of these two rules is concerned it has been fully considered in several decisions of this Court. Reliance was placed on three decisions reported in *Ram Narain Tewari* v. *Ram Chander Sharma* (1), *Chandra Bhan* v. *The Rent Control and Eviction Officer, Agra* (2) and *Bhakat Shiroman* v. *The Rent Control and Eviction Officer* (3) and one reported in *Prem Narain Tayal* v. *Girish Chandra Khare* (4).

In *Ram Narain Tewari* v. *Ram Chander Sharma* (1) it was held by a Bench of this Court that

> Rule 6 framed under section 17 of the U. P. (Temporary) Control of Rent and Eviction Act requires the District Magistrate to permit the landlord to occupy an accommodation which has fallen vacant or is likely to fall vacant, if it is *bona fide* needed by him, (i.e. the landlord). If there is nothing to show in the order which was passed by the Rent Control and Eviction Officer, that he exercised his mind on the point whether the need of the landlord was of a *bona fide* character or not and the sole consideration with him appears to have been the fact that the need of the other person was most genuine the order of allotment cannot be allowed to stand.

That decision had also interpreted rule 7 and it was observed that—

> If a portion of the building a substantial portion of which is already in occupation of the landlord, falls vacant then before passing any order in regard to the allotment of the vacant portion, it is obligatory on the Rent Control and Eviction Officer under rule 7 framed under section 17 of the U. P. (Temporary) Control of Rent and Eviction Act to consult the owner and to make as far as possible the allotment in accordance with the wishes of the owner and if he fails to do so the order of allotment cannot be allowed to stand.

(1) 1953 A.L.J. 83
(2) 1953 A.L.J. 440
(3) 1953 A.L.J. 553
(4) 1954 A.L.J. 62

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In that case there was nothing in the order of allotment to show that the Rent Control and Eviction Officer exercised his mind on the point whether the need of the landlord was of a *bona fide* character or not and the Rent Control and Eviction Officer had not consulted the landlord when he was occupying a major portion of the house and only a minor portion of it was to be allotted. We respectfully agree with the observations made by the learned Judges in that case and in the present case also we find that there is nothing on the record to show that the Rent Control and Eviction Officer ever cared to enquire into *bona fides* of the needs of the landlord nor did he issue a notice to the landlord when only one of the rooms of the big house had fallen vacant. Therefore, in our opinion the order of the Rent Control and Eviction Officer had been passed without compliance of the rules.

The second case relied upon by the learned counsel which is reported at page 440 of the same volume is also a Bench decision where it was held:

> When the Rent Control and Eviction Officer decides a question of fact the result of which determines the right of a person to the benefit of rule 4 he acts in a quasi judicial capacity. Although the act of issuing an allotment order may be administrative act, the consideration which must precede the doing of that act in a case (such as the present) in which the rights of one party depend upon the existence of a particular state of facts is of the nature of a quasi judicial consideration. He cannot make that decision in his discretion but must reach his conclusion after hearing the persons whose rights are likely to be affected and after giving them a full opportunity of placing their case before him. This has not been done in the present instance and the order of the 6th June cannot therefore, in our opinion be sustained.

In that case actually it was rule 4 which was under consideration. Where rights of parties are affected, as has been held in that case, we respectfully agree that the

proceedings are of quasi judicial character In any event, the principles of natural justice are to be followed and an opportunity in that event should be given to the parties to produce their evidence, and the decision should be arrived at after that enquiry If the order of the Rent Control and Eviction Officer is a pure and simple order of allotment that may be purely an administrative order But if an order is to be passed under rules 4 6 or 7 then, in that event, since the proceedings are of a quasi judicial nature we think the order itself would be of a quasi judicial nature and if the provisions of the Act are not followed or even if the principles of natural justice are not followed the order would not be sustainable

In the present case, the right of the plaintiff to occupy the house was a valuable right If he needed it *bona fide*, he had under the rules a right of allotment in his favour For that purpose a notice was absolutely necessary which admittedly had not been given to him Secondly as required by rule 7, as has already been mentioned no enquiry was made from him about the desirability of the tenant

In the third decision reported in *Bhakat Shiromani* v *The Rent Control and Eviction Officer* (1) wherein the object of rule 7 has been enunciated it was held

> In our opinion the purpose of this rule (rule 7) is to avoid as far as possible the friction and difficulties which may arise in those cases in which an owner has in effect, to share his house with a tenant of whom for some reason he may disapprove and that when the rule provides that the Rent Control Officer shall consult the owner it means that the owner has to be consulted as to the suitability of the proposed tenant

This authority also fully supports the contention of the plaintiff It was argued by the learned counsel for the plaintiff that here the allotment has been made in favour of one Ram Khelawan for opening a betel shop There all sorts of undesirable people might visit

(1) 1953 A L J 553

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and since the disputed room is in a portion of the house wherein the appellants are themselves living they would be most reluctant to have that kind of shop in their house and under the circumstances this allotment order should not have been made

In *Prem Narain Tayal* v. *Girish Chandra Khare* (1) a Bench of this Court of which one of us was a member had held that—

> If a Rent Control Officer does not apply his mind and does not take into consideration the request of the landlord for allotment of the whole or part of his own house to him and makes an allotment in favour of a third party, such an order would be an invalid order

It was thus contended by the learned counsel for the appellants that there cannot be the least doubt that in the present case the order had been made without the consent of the landlord hence the order was bad On behalf of the Rent Control Officer it was contended that though these provisions were not followed, but even if these provisions had been followed, the discretion was with the Rent Control Officer therefore, he could exercise the right in any manner that he liked Reliance was placed on the words 'the District Magistrate *may* permit the landlord to occupy it himself and it was argued that it was not obligatory on the District Magistrate to allot the house to the landlord because the word used was not shall but may which is not mandatory Similarly reliance was placed on the words the District Magistrate shall before making the allotment order, consult the owner and shall *so far as possible* make the allotment in accordance with the wishes of the owner It was therefore, argued that since in both the rules the words were only permissory and enabling ones they would not have a compulsory force and therefore non compliance of these rules does not materially affect

In our opinion the words may undoubtedly be only empowering but it has been so often decided as to have

(1) 1954 A.L.J. 62

become almost an axiom that in public statutes words only directory permissory or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice It was so held in *Reg v Tithe Commissioners* (1)

In *Frederic Guilder Julius v The Lord Bishop of Oxford* (2) at page 223 Lord EARL CAIRNS had held

> But there may be something in the nature of the thing empowered to be done something in the object for which it is to be done, something in the conditions under which it is to be done something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with a duty and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so

In *State of U P v Manbodhan Lal Srivastava* (1) their Lordships quoted Crawford on Statutory Construction —Art 261 at page 516

> The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed The meaning and intention of the Legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature its design and the consequences which would follow from construing it the one way or the other

Thereafter they held

> On the other hand it is not always correct to say that where the word may has been used the statute is only permissive or directory in the sense that non compliance with those provisions will not render the proceedings invalid

Counsel for respondent no 2 Ram Khelawan had placed reliance on a Bench decision of this Court in

(1) L R [1849] 14 Q B 459 (2) L R [1879 80] 5 A C 214
(3) A I R 1957 S C 912

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Ram Autar v. *Rent Control and Eviction Officer, Jhansi* (1) where their Lordships were considering rule 8 and it was held that rule 3 was not mandatory, it was only directory They held that—

> There is no restriction imposed by the Act with regard to the period within which an order shall be made, and in our opinion the State Government has no power to impose such a restriction by a rule Under section 17 of the Act the State Government is empowered to make rules to give effect to the purposes of this Act The purposes of the Act are to control the letting and the rent of available accommodation and to prevent the eviction of tenants therefrom and we are unable to hold that a rule which severely restricts the powers of a District Magistrate to control the letting of accommodation conferred upon him by the Act can properly be described as a rule giving effect to the purposes of the latter'

If the meaning of the decision was that the power of the District Magistrate under section 7 could not be regulated by the rules at all, then in that event, we respectfully disagree with the aforesaid decision We might have been inclined to refer this question to a larger Bench but since technically that authority has been given under rule 8, and there are already several decisions of this Court where rules 6 and 7 have been held mandatory, it is not necessary for us to refer this matter to a larger Bench

The power which has been given under section 7 (2) to the District Magistrate is wholly uncanalized power and it may result in placing an absolute restriction on the enjoyment of the property by the landlord If that section had stood by itself it might have been liable to be challenged under Article 19 (1) (*f*) of the Constitution which provides

> 19 (1) All citizens shall have the right
> (*f*) to acquire, hold and dispose of property ,"

(1) I L R [1959] 1 All 284

This fundamental right, which has been given, is subject to sub article (5) which lays down

> Nothing in sub clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

A landlord could either let it out to the tenant and enjoy the rent or he could occupy it himself and thus hold it and enjoy the occupation of the house In the first case whether a tenant is *A*, *B* or *X*, *Y* it is immaterial His right to the property is unaffected, if he gets the rent, but in case he wants to occupy the property himself or himself with somebody else then, in that event, if he is stopped from occupying it himself his right to hold the property would be affected

Section 7 (2) of the U P Control of Rent and Eviction Act provides

> The District Magistrate may by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant

This section as we have already mentioned is in too wide terms and there are no restrictions imposed on the exercise of his discretion and that being of subjective nature is also not justiciable Therefore unless they were qualified and the manner in which that right would be exercised would be indicated this section according to us would infringe the fundamental right of the owner It was for the purpose of giving effect to the Act that rules were framed under section 17 and therein it was provided how his discretion was to be exercised Therefore in our opinion the rules, which had been framed, in order to control and regulate the discretion under section 8, have been made in order to give effect to the Act"

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V. D. Bhargava J.

The Act had been framed for the purpose of control of letting and the rent of residential and non residential accommodation and to prevent eviction of tenants there from The Act was not in any way framed to affect the rights of the owners to occupy the house if they so desired and if they were actually in need of it themselves The main object of the Act as shown in the preamble was that the landlords may not charge a higher rent or if they have to let out, may not choose the tenants Rule 5 which provides that the allotment should be made within thirty days is a most salutary rule A landlord is entitled to the rent from the date a house is vacated If rule 5 was not there it was open to the District Magistrate not to pass an allotment order for two three or even five years or to direct the landlord not to let it out to any person till further orders There the landlord would lose his rent and his right to hold and enjoy the property would be so seriously affected as to result practically in the non enjoyment of the property Therefore a reasonable restriction was placed, among others, that in case the Rent Control Officer is not able to allot it was open to the landlord to nominate a tenant to whom the accommodation will be allotted In that event it could not be said that the landlord would lose on account of the action of the District Magistrate Even in that case he could allot it so somebody else if he could give valid reasons for so allotting

Similarly rules 6 and 7 have been made to preserve the right of the landlord if he wants to occupy the house himself or to choose a tenant if he is the occupant of a portion of it

The action under section 7 which is taken by the District Magistrate is primarily in the nature of an administrative action and in our opinion it is within the competence of the Legislature to delegate its authority to the Government to frame rules in accordance with which that administrative discretion would be exercised That discretion is not primarily of a judicial nature and in our opinion it is always open if the Act so provides, to provide for rules When once that authority is

delegated as in the present case we think it has properly been delegated the exercise by the State Government of that power would be an exercise of that power by the Legislature itself and it would be treated as if the rules had been expressed in the first instance in the Act itself It was so held in *National Telephone Company v Baker* (1)

The rules can be challenged—

(i) If they are not reasonable and not convenient for carrying out the Act into effect

(ii) if the rules relate to matters outside the scope of the Act,

(iii) if they relate to matters not provided in the Act, and

(iv) if they are inconsistent with the provisions of the Act

Here we find that the State Government in framing those rules had neither exceeded their power, nor the rules are inconsistent unreasonable or inconvenient In the circumstances we think that the rules made under the Act when they had been made for the purpose of giving effect to the Act should be deemed to be part and parcel of the Act itself

From the above discussion it is clear that the order of the Rent Control and Eviction Officer cannot be supported as it was in direct breach of rules 6 and 7 of the provisions

The next question is whether sections 13 and 16 of the Rent Control and Eviction Act bars the suit So far as section 13 is concerned no suit or proceeding is taken against any person for anything which is done in good faith In this case it is the order itself which is being challenged and no suit for damages has been filed against the State for any action Therefore section 13 does not come into play As regards section 16, learned single Judge had held that the suit was barred on its account Section 16 of the Act provides

No order made under this Act by the State Government or the District Magistrate shall be

(1) L R [1893] 2 Ch 186 203

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called in question in any court

Section 16 of the U. P. Control of Rent and Eviction Act very much corresponds to section 16 of the U. P. (Temporary) Accommodation Requisition Act (Act XXV of 1947 and the word question had come for interpretation before this Court in a Divisional Bench case in *Sri Ram Chandra* v. *The District Magistrate of Aligarh* (1) and the Bench came to the conclusion that the word question meant called in question as regards its reasonableness or practicability and could not mean challenging its legality It was held

> Where the authority exceeds the powers conferred upon it or makes an order disregarding the conditions subject to which and the limits up to which it can pass an order, the civil courts can certainly interfere The power of the civil court to question whether the order was *intra vires* or *ultra vires* the authority making it is not taken away by the section

In *The Secretary of State for India in Council* v. *Roy Jatindra Nath Choudhry* (2) their Lordships of the Privy Council held

> The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary

> Two conditions, however, must be noted the first is that mentioned viz that fundamental irregularity, that is to say, a defiance of or non compliance with the essentials of the procedure would still give ground for questioning the proceedings in a court of law

Here in the present case the question is whether there had been an irregularity by direct defiance or non compliance of the rules 6 and 7 or not If there has been then in our opinion the civil courts would have jurisdiction to interfere and the finality placed by section 16 would no longer be available as defence

(1) 1952 A.L.J. 114 (2) A.S.R. 1924 P.L. 175

In *Secretary of State* v *Mask & Co* (1) their Lordships of the Privy Council had held

> It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied It is also well settled that even if jurisdiction is so excluded the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure

We, therefore think that the learned single Judge and the court below were not right in holding that section 16 of the Act barred the present suit

Learned counsel for defendant no 1, the Rent Control Officer had contended that so far as he is concerned as no notice under section 80 Civil Procedure Code had been given the suit as against him was bad and, therefore so far as he is concerned no order could be passed as against him Formerly there was a conflict of decisions as to whether section 80 applied to suits whether the relief claimed was of perpetual injunction or not but now this matter has been set at rest in *Bhagchand* v *Secretary of State* (2), which has approved the view of Calcutta Allahabad and Madras decisions and which has held that this section applies to all kinds of suits Therefore certainly so far as defendant no 1 is concerned no relief could be granted in the suit itself, but the relief certainly can be granted as against defendant no 2 that he would be restrained from taking possession of the premises under the allotment order which has been passed

It may not be possible for us to grant a decree in the suit but in spite of that fact we think that this Court has a jurisdiction under Article 226 of the Constitution to grant the relief as against the defendant no 1 even though this matter had not come in its writ jurisdiction on an application under Article 226 This we think

(1) A I R 1940 P C 105 (2) (1926-27) L R 54 I A 338

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necessary because if in the office of the Rent Control Officer the allotment order continues in favour of Ram Khelawan and Ram Khelawan is restrained from taking possession there is likely to be a conflict and it may be difficult for the Rent Control Officer to have any further allotment order

Therefore we allow the appeal, set aside the decree of the courts below and issue a mandamus to the Rent Control and Eviction Officer Lucknow to act in accordance with law and direct that defendant no 2 be restrained from taking possession of the property The respondent no 1 shall give full opportunity to the plaintiff to consider his needs and if he comes to a conclusion that it is genuinely needed by the appellant he may allot the premises to him In case he finds that the need is not genuine, he will consult the landlord as to the tenant to whom it should be allotted and the allotment order shall be made as far as possible to the nominee of the landlord The appellants are entitled to their costs throughout from defendant no 2 The defendant no 1 shall bear his costs throughout

Appeal allowed

CIVIL MISCELLANEOUS

*Before Mr Justice Mukerji**

1959

April 15

BOODAN (PETITIONER)

v

ASSISTANT CUSTODIAN GENERAL, EVACUEE PROPERTY AND ANOTHER (RESPONDENTS)

United Provinces High Courts Amalgamation Order, 1948 *cl 14 scope of—Case arising within the areas, meaning of*

Plots of land in respect of which *bhumidhari* rights were claimed and in respect of which the order of the Assistant Custodian General was made were situate at Meerut which is not one of the areas over which the Lucknow Bench exercised jurisdiction

*Sitting at Lucknow

Held, that the case out of which this writ petition has risen did not arise within the area over which the Lucknow Bench could exercise jurisdiction under the provision of clause 14 of the Amalgamation Order

Union of India v. *Messrs Ghheda Lal Ram Autar* (1) relied on

WRIT PETITION no 59 of 1959 under Article 226 of the Constitution of India

The facts appear in the judgment

B K Dhaon for the applicant

G T Wadhwani for the opposite parties

MUKERJI, J —This is a petition by Boodan praying for a writ of certiorari or any other appropriate writ or order to be issued by this Court against the Assistant Custodian General commanding him to produce the record of the case referred to in the petition and thereafter to quash the order made by the Assistant Custodian General on the 19th January 1959

It appears that in respect of certain plots of land *bhumidhari* rights were claimed These plots of land were evacuee property and under the law *bhumidhari* rights in respect of evacuee property could only be granted by the Custodian of the Evacuee Properties on the fulfilment of certain conditions Certain orders were made by an Assistant Custodian (Judicial) I Meerut Thereafter a petition in revision was made and final orders on that revision appear to have been made by the Assistant Custodian General The Assistant Custodian General happened to be functioning at Lucknow

A preliminary objection was taken on behalf of the respondents to the effect that this petition was not entertainable by the Lucknow Bench of the Allahabad High Court on the ground that the case out of which this writ petition had arisen did not arise within the area over which the Lucknow Bench could exercise jurisdiction under the provision of clause 14 of the Amalgamation Order It was pointed out in this connection that

(1) I L R (1958) 2 All 72

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the plots of land in respect of which *bhumidhari* rights were claimed and in respect of which the order of the Assistant Custodian General had been made were situate at Meerut which was not one of the areas over which the Lucknow Bench exercised jurisdiction. Reliance was placed on a decision of this Court in writ petition of *Badloo Ram* v. *Deputy Commissioner of Gonda* (1), wherein a Bench of this Court of which I had the privilege of being a member held that the Lucknow Bench could validly entertain a petition for writ only when a case arose within an area which was amenable to the jurisdiction of the Lucknow Bench under the Amalgamation Order. *Badloo Ram's* case was a converse case, for there the origin of the dispute or the origin of the case was at Gonda which was admittedly within the jurisdiction of the Lucknow Bench but the order—the final order which was the subject of challenge in the writ petition—was made by the Excise Commissioner at Allahabad where he had his permanent office. In *Badloo Ram's* case the preliminary objection was raised on behalf of the respondents and the preliminary objection was on the ground stated above rejected by the Bench. I am bound by the Bench decision in *Badloo Ram's* case but Mr *Dhaon*, who appeared on behalf of the present petitioner Boodan contended that he was not bound by it and that he could argue to show that the decision in *Badloo Ram's* petition was incorrect or at any rate needed re consideration. Since I was a party to that decision, I was most anxious to know from Mr *Dhaon*, where we had gone wrong in *Badloo Ram's* case. I therefore let Mr *Dhaon* say all he had to in regard to this rather important question.

The main contention of Mr *Dhaon* was that the decision in *Badloo Ram's* petition proceeded on the assumption that clause 14 of the Amalgamation Order was *intra vires* the Constitution. It is undoubtedly true that in *Badloo Ram's* case nobody contended that clause 14 of the Amalgamation Order was in any manner put in jeopardy by any constitutional provision. What

(1) Civil misc. writ no. 279 of 1958

Mr *Dhaon* contended was that when the Amalgamation Order was drawn up or passed i e in 1948 there were no constitutional guarantees for the citizen and, therefore when the framers of the Amalgamation Order used the word case in clause 14 of that Order they only had in mind such cases as could have arisen at that time Mr *Dhaon* contended that they could not possibly have thought of cases which could arise subsequently for the enforcement of the constitutional guarantees and they could not therefore contemplate cases under the new jurisdiction which was conferred on it by Article 226 of the Constitution Mr *Dhaon s* contention was that in interpreting a provision of law one has to bear in mind the circumstances under which that law was made and one has also to bear in mind the intendment of the enactment No one can have any dispute with the broad propositions of interpretation on which Mr *Dhaon* relies but the difficulty was when Mr *Dhaon* attempted to put into use the aforementioned principles of interpretation in showing that clause 14 of the Amalgamation Order did not mean what it purported to mean or the meaning of clause 14 of the Amalgamation Order was some thing different from what a mere reading of that clause showed I tried to follow Mr *Dhaon s* argument with care but I failed to see any appropriate grounds on which I could accept that argument Clause 14 of the Amalgamation Order speaks of cases arising in a particular area It also speaks of the jurisdiction and powers for the time being vested in the new High Court The reference to jurisdiction and power for the time being vested must in my opinion refer to all such powers and jurisdictions of the new High Court as it possessed by virtue of being a High Court, whether those powers and jurisdictions were there or not at the date when the Amalgamation Order was made It is trite knowledge that laws of the type of which the Amalgamation Order was one are meant to have permanent effect They are not like those laws which constantly keep on being changed according to the exigencies of the situation by Legislative amendments the Amalgamation Order was a kind of Charter which created

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the new High Court of which the Lucknow Bench was an integral part The Amalgamation Order replaced what was earlier the Letters Patent of the Allahabad High Court The old Allahabad High Court had been created as we know under the Letters Patent The new High Court viz the High Court that came in existence on the Amalgamation of the Chief Court of Avadh and the High Court of Judicature at Allahabad, came into existence by the United Provinces High Courts (Amalgamation) Order 1948 Therefore it was in the nature of a Charter of this Court If the argument of Mr *Dhaon* were accepted namely that clause 14 of the Amalgamation Order had nothing to do with the writ jurisdiction of this Court or in other words clause 14 of the Amalgamation Order did not affect or in any manner control the power of the Court to entertain and dispose of writ applications which could be filed under the provisions of Article 226 then it would amount to saying that a part of the jurisdiction exercised by this Court—and a very important part at that—was being exercised independently of the Amalgamation Order which as I have shown above was the parent or creator of the new High Court This Court existed as a High Court at the time when the Constitution came into effect so that this Court could exercise any of the powers which were conferred on High Courts under Article 226 of the Constitution

The next contention of Mr *Dhaon* was that the word case in clause 14 of the Amalgamation Order did not refer and it could not refer to writ applications which according to Mr *Dhaon* were something different and outside the connotations of the word case and therefore he contended that even if clause 14 of the Amalgamation Order was valid even so it could not affect writ petitions and that writ petitions could be filed at the pleasure of the litigant at any of the two places namely Lucknow or Allahabad I have seen no reason to hold that the word case could not or did not include a writ petition As was pointed out in *Badlloo Ram's* case the connotation of the word 'case' was

different from the connotation of the word suit appeal or proceeding The connotation of the word case varied under different circumstances and I have no doubt in my mind that writ petitions could very well come within the meaning of the word case in clause 14 of the Amalgamation Order

The next argument of Mr *Dhaon* was that in respect of a writ petition it could not be contended that if the writ petition was a case then it arose anywhere except where an order was made which the petitioner challenged by the writ petition If the order which was being challenged had its first origin at the place where it was made then there was no difficulty in holding that the origin of the case in respect of that particular order was the place where that order was made but where the order which was being made the subject of challenge in the writ petition was the culmination or was the ultimate order made in a case which arose somewhere else earlier, then in attempting to determine where the case in respect of a particular writ application arose one had to find out the place of origin of the case which culminated so to speak in the order which was being challenged by the writ petition It was pointed out in *Badloo Ram* v case that in respect of that case Gonda was the place of origin because it was there that the auction of the excise shops took place while Allahabad was the place of culmination of that dispute because it was at Allahabad that the Excise Commissioner made his ultimate order

Clause 14 of the Amalgamation Order did not in any manner affect either by curtailment or in any other way the jurisdiction which was conferred on a High Court One has clearly to see the distinction between power and jurisdiction and the manner in which the power is to be exercised in respect of a jurisdiction Under Article 225 of the Constitution, the jurisdiction of and the law administered in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting

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alone or in Division Courts was to remain the same as was immediately before the commencement of the Constitution. This Court like any other court, did make rules whereby the writ petitions filed against orders made in certain areas could be heard by certain Judges or heard by Judges sitting at a certain place and if that could be so then I do not see any reason why the Amalgamation Order by clause 14 could not prescribe a place for receiving of petitions or cases or appeals arising in certain areas at one place and another place for receiving petitions etc. arising in another area. In this connection I may also make a reference to the decision in *Union of India v. Messrs. Chhedu Lal Ram Autar* (1). In this Full Bench decision it was held that the Judges sitting at Lucknow could deal only with cases arising in Avadh and that sitting there they could not deal with cases arising outside Avadh but in respect of cases arising in Avadh they could exercise all the power and jurisdiction which is vested in the High Court for the time being.

For the reasons given above, I have come to the conclusion that the preliminary objection in this case should prevail and that the petition could not be filed and heard by the Lucknow Bench.

I accordingly direct that this petition be returned to Mr. *Dhaon* for presentation at Allahabad.

Petition returned for proper presentation.

(1) I. L. R. [1958] 2 All. 72

CIVIL MISCELLANEOUS

*Before Mr Justice Tandon**

MOHAMMAD YASIN (PETITIONER)

v

SUPERINTENDENT OF POLICE, SITAPUR AND OTHERS

(OPPOSITE PARTIES)

1959 *May* 4

History sheet—*Confirmed as professional criminal—U P Police Regulation 228 scope of—Administrative action, jurisdiction of the Court—Constitution of India, 1950 Art 226 scope of*

Held that the jurisdiction to start a history sheet under Regulation 228 arises from the fact that a particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material

If in any particular case there is complete absence of any such material the action in starting a history sheet will not only be illegal but also without jurisdiction

Held further that although the opening of a history sheet is purely an administrative action and ordinarily the High Court will not interfere in administrative actions where the action taken is on the face of it arbitrary or capricious and is without jurisdiction the powers of the High Court under Article 226 are not wanting

Civil Miscellaneous Writ No 39 of 1958

The facts appear in the judgment

Kalbe Mustafa for the applicant

The Standing counsel for the opposite parties

TANDON, J —The petitioner is one Mohammad Yasin who is employed as a peon under Mahmudabad Estate He is in the service of the Estate from his boyhood and gets a salary of Rs 20 per month besides another Rs 30 as Pahradar of one of the Mahajans at Mahmudabad He also owns a bullock cart and a couple of bullocks from which too he makes some earning

*Sitting at Lucknow

1959

MOHAMMAD YASIN v. SUPERINTENDENT OF POLICE SITAPUR

Tandon J.

A cattle market is held at Ghazipur in Mahmudabad Estate under the direction and control of that Estate Mohammad Yasin has, in the course of his duty as peon of Mahmudabad Estate, to attend this market In March 1957 an anonymous complaint reached the Superintendent of Police, Sitapur, within whose territory this bazar is held, to the effect that Mohammad Yasin who looks after the arrangements in this market causes pick pocketing and commission taking (*giradkati aur bazar ke andar dalali karte hain*) to be done An instance as regards stealing of two bullocks belonging to one Brahma was also cited in which it was alleged, that Baij Nath constable hushed up the matter after accepting illegal gratification from Fakire The bullocks claimed by Brahma were stated to have been stolen by his own brother in law who was apprehended while he was trying to dispose them of to a purchaser in the market This Superintendent of Police made the following order on this anonymous petition

> I smell truth in this anonymous complaint
> Please conduct an enquiry

One Ram Murti Singh Assistant Complaints Officer then held an enquiry in pursuance of the above order

His report is Annexure 2

It appeared from it that Sri Ram Murti Singh interrogated several persons in the course of the enquiry including the petitioner A summary of their statements was included by him in his report also

It was clear from this report that the main incident, namely that two bullocks were sought to be sold by Fakire to a purchaser in the bazar and that Brahma arrived at the spot while the transaction was still proceeding was found to be correct by the enquiring officer The petitioner too admitted that he was present in the bazar when Baij Nath constable apprehended the two bullocks and took them to the police station But he denies that he accompanied Baij Nath to the police station where, according to Sri Ram Murti Singh, they were released by Baij Nath after accepting money from

Brahma who was their owner The report also stated that Fakire was own brother in law of Brahma hence the latter was anxious to protect him from prosecution, etc and there was little chance of evidence being forthcoming The report which he, therefore, ultimately submitted was that a case against Baij Nath was difficult to be proved but at the same time he recommended that a history sheet might be opened in the case of the petitioner As a result the history sheet the subject matter of this petition was directed to be opened

Paragraph 228 of the Police Regulations under which history sheets are started makes provision firstly for history sheets usually called history sheets of class A, pertaining to dacoits, burglars, cattle thieves and railway goods wagon thieves and of class B pertaining to confirmed and professional criminals who commit crimes other than dacoity burglary cattle thefts and thefts from railway goods wagon Class B history sheets, as the regulation lays down can be opened in the case of professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department prisoners cattle poisoners railway passenger thieves bicycle thieves expert pick pockets, forgers coiners, cocaine and opium smugglers hired ruffians and *goondas*, telegraph wire cutters and habitual distillers The history sheet which has been started in the instant case is of this class

The accusations levelled against the petitioner in the anonymous complaint have already been noticed Briefly they were that he encouraged pick pocketing and commission taking in the market There was no charge that he himself was a pick pocket or belonged to any of the categories of criminals referred to in regulation 228 aforesaid It simply accused him of helping offenders in pick picketing i e in carrying out their nefarious activities What was said against him was that he encouraged pick pocketing and not that he himself indulged in it or that he was an expert pick pocket The other allegation was that he took commission in the bazar There can scarcely be any objection to the taking of

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MOHAMMAD YASIN v. SUPERINTENDENT OF POLICE STATION

Tandon J.

commission in trade transactions if that alone was the intention in accusing him of such a conduct No offence is thereby committed for the prevention of which action or precaution might be necessary No question, therefore of starting a history sheet by way of preventive action could at all arise on that account And if the implication in the said accusation was that he helped persons in accepting illegal gratification, again it is not possible to bring him within the description of persons illustrated in regulation 228 and in whose case history sheets can be started But even if it be considered for a moment that the petitioner became liable for the commission of an offence by acting in the manner attributed to him, the ultimate situation will, in my opinion, not improve in view of what appeared from the report itself submitted by Sri Ram Murti Singh This document does not claim to refer to any instance in which the petitioner was found or suspected to have participated in the commission of pick pocketing and bribe extraction Although Sri Ram Murti Singh examined a number of witnesses in the course of the investigation it does not appear from whatever summary of their statements he included in his report that even one witness stated any facts which involved or tended to involve the petitioner in case of accepting or taking of bribe or of encouraging pick pocketing Even in the case of the particular instance complained of in the anonymous petition Sri Ram Murti Singh failed to refer to the particular part played by the petitioner i e a part which would induce a reasonable person to suspect, much less hold, that the petitioner was actively connected in the release of the two animals or in persuading Baij Nath to do so, or even that Baij Nath had been paid at his instance The utmost that one may urge on its basis is that the petitioner was present at the police station where the bullocks had been carried and ultimately released It is most surprising that Sri Ram Murti Singh should still report that Mohammad Yasin played an important part in the hushing up of the matter The surprise does not end there because he further reported that there was general complaint against him to the effect

that he was in league with pick pockets etc when none of the witnesses whose summary of statement he recorded appeared to have made such a claim One is at pains to find how he reached at this conclusion and why if any general complaint was voiced against him he remained silent about it though it was a very material fact

In the absence of any general complaint as does not appear to have been urged by any witness the only instance which was alleged and in which the petitioner was or could be said to be involved was the sale of two bullocks by Fakire Whether he was actually involved in it or not will not be necessary to decide for the present purposes as shall be presently pointed out Regulation 228 makes provision for the starting of history sheets in the case of confirmed and professional criminals only A history sheet can therefore be started only where there is some ground for thinking that the particular person is a confirmed and a professional criminal Merely because a person is guilty on a certain occasion of some offence or is suspected to be so guilty will not make him confirmed and professional criminal It is necessary that he should ordinarily be given to the committing of offences It will be an abuse of regulation 228 to start a history sheet against a person who has on some occasion committed an offence but who is not a confirmed and professional criminal The jurisdiction to start a history sheet arises from the fact that the particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material If in any particular instance there is complete absence of any such material the action in starting a history sheet will not only be illegal but in my opinion without jurisdiction too In the instant case there is indeed no material even in the report of Sri Ram Murti Singh, which could warrant the conclusion or even the suspicion that the petitioner was a habitual criminal His report, therefore that he was so was manifestly wrong and capricious The action thereon must similarly be held to be arbitrary and capricious

1959

MOHAMMAD YASIN v. SUPERINTENDENT OF POLICE, SIVAPUR

Tandon, J.

The petitioner has stated also why the history sheets had been started against him. It is not necessary to record any opinion on this question in view of the fact that upon the report as it is the decision to start history sheet was manifestly wrong and capricious.

It was contended that the opening of a history sheet was purely administrative action and it was not open to this Court to interfere with it in these proceedings. Ordinarily this Court will not interfere in administrative actions but where the action taken is on the face of it arbitrary or capricious and is without jurisdiction the powers of this Court are not wanting.

In the result, therefore, it follows that the history sheet opened against the petitioner is illegal. This petition is accordingly allowed and the respondents are directed to cancel the history sheet started against the petitioner. The petitioner will get his costs from the respondents.

Petition allowed.

PSUP—A P 3 HC (ILR)—1960 1,250.

APPELLATE CRIMINAL

1957

December 22

*Before Mr Justice Beg and Mr Justice Mulla**

MUNICIPAL BOARD, LUCKNOW

v

SHYAM BEHARI

Food Adulteration—*Food Inspector and Public Analyst under the previous Act—General Clauses Act, 1897 s 6(b) scope of—Prevention of Food Adulteration Act 1954 ss 7 and 16 applicability of—administrator of Municipal Board, powers of*

Shyam Behari is the owner of a milk shop and Ram Lal his servant at the said shop A food Inspector purchased half a seer of milk from Ram Lal and he put this milk in three bottles which were corked sealed and labelled in the presence of witnesses Shyam Behari was upstairs at the time of the sale of milk but he came down later on and a notice was also given to him Two sealed sample bottles were sent to the office of the Medical Officer of Health The Medical Officer of Health sent one sample bottle to the Public Analyst who sent his report showing that the milk contained 19 per cent added water and was adulterated The Medical Officer of Health on behalf of the Municipal Board Lucknow submitted a complaint against Shyam Behari and Ram Lal Ram Lal could not be traced Prosecution started against Shyam Behari

Held that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food but also the person on whose behalf the adulterated food is sold and Shyam Behari is liable to be punished under ss 7 and 16 of the Prevention of Food Adulteration Act

Held that until fresh appointments are made appointments duly made under the previous Act must be considered to be valid and good and the Food Inspector and the Public Analyst must be taken to be persons competent to act as such when the offence took place

Held also that there was an order by the Administrator which empowers the Medical Officer of Health of the Municipal Board to launch prosecutions of this nature and hence the complaint was good in law

Criminal Appeal no 321 of 1958 from an order of B B Misra Civil and Sessions Judge of Lucknow dated the 16th April 1956

*Sitting at Lucknow

1957

Municipal Board Lucknow v. Shyam Behari

The facts appear in the judgment

B L Kaul for the appellant

Onkar Prasad for the respondent

The judgment of the Court was delivered by—

BEG, J —This is an appeal by the Municipal Board Lucknow It is directed against an order of acquittal of one Shyam Behari passed by Sri B B Misra Civil and Sessions Judge Lucknow

The respondent Shyam Behari was prosecuted for an offence under section 7, read with section 16 of the Prevention of Food Adulteration Act 1954 (Act 37 of 1954) He was convicted by the trial court and sentenced to pay a fine of Rs 600 or in the alternative to undergo four months simple imprisonment On appeal he was acquitted by the learned Civil and Sessions Judge Lucknow Dissatisfied with the said judgment this appeal has been filed by the Municipal Board Lucknow against the said order of acquittal

Shyam Behari is admittedly the owner and proprietor of a milk shop situate at Gwynne Road, Lucknow One Ram Lal used to work as his servant at this shop On the 15th of September 1955 Sri O P Mehrotra Food Inspector paid a visit to this shop in the morning at about 8 30 a m He purchased half a seer of milk from Ram Lal and paid annas 4 as its price He took this milk in three bottles These bottles were duly packed corked sealed and labelled in the presence of the witnesses, Sri K N Agarwal Sankata Prasad and Bhagwan Din who were present at the shop from the beginning In the meantime Shyam Behari who was upstairs came down On his appearance Sri Mehrotra handed over a notice to him This notice is Ex P (1) Shyam Behari signed this notice The original of the notice was also signed by the witnesses Two sealed sample bottles were sent to the office of the Medical Officer of Health The Medical Officer of Health sent one sample bottle to the Public Analyst The Public Analyst sent his report, Ex. P (2) This report showed

that the sample of milk sent to him contained 19 per cent added water and was adulterated Thereafter, a complaint was submitted against Shyam Behari by the Medical Officer of Health on behalf of the Municipal Board Lucknow The complaint was against Shyam Behari as well as Ram Lal his servant Ram Lal, however could not be traced Shyam Behari was the only person against whom the prosecution proceeded

The acquittal of the respondent in the present case was made by the lower appellate court on two grounds The first ground was that no examination of the respondent was made under section 342 of the Code of Criminal Procedure On this point the lower appellate court appears to have ignored the fact that there is on record an examination of Shyam Behari under section 342 of the Code of Criminal Procedure He was put detailed questions on matters appearing in evidence against him He admitted that the shop of milk belonged to him He further admitted that Ram Lal was his servant He also admitted in his statement that the notice Ex P (1) bore his signature He also admitted that the sample of milk was taken from a karahi of his shop He denied the fact that the milk was adulterated Under the above circumstances we are of opinion that the acquittal order cannot be sustained on the ground that no examination of the accused under section 342 of the Code of Criminal Procedure was done

The second ground for acquitting the respondent was that the person who had committed the offence was his servant Ram Lal and Shyam Behari, being the proprietor, could not have been convicted This ground taken by the learned lower appellate court also appears to be clearly untenable Section 7 of the Prevention of Food Adulteration Act, 1954, (Act 37 of 1954), lays down as follows

> No person shall himself or by any person on his behalf manufacture for sale, or store sell or distribute
>
> (i) any adulterated food

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MUNICIPAL BOARD LUCKNOW v. SHYAM BEHARI

Beg, J

Under the above provision it is clear that not only the person who actually sells the adulterated food is prohibited from doing this act but also any person on whose behalf the food is sold In this particular case Shyam Behari was admittedly the proprietor of the shop Ram Lal was acting on his behalf The sale made by Ram Lal was therefore on behalf of Shyam Behari The Penal section viz, section 16 of the same Act, also leads us to the same conclusion It lays down as follows

> (a) whether by himself or by any person on his behalf imports into India or manufactures for sale, or stores, sells or distributes any article of food in contravention of any of the provisions of this Act or of any rule made thereunder or
>
> [(b) to (g) omitted]

he shall in addition to the penalty to which he may be liable under the provisions of sect on 6 be punishable—

> (i) for the first offence with imprisonment for a term which may extend to one year or with fine which may extend to two thousand rupees or with both
>
> [rest omitted]

The above provision also makes it quite clear that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food but also the person on whose behalf the adulterated food is sold In this view of the matter we are of opinion that Shyam Behari was liable to be punished and his acquittal was not justified

Learned counsel for the respondent has argued a number of other points also before us He has argued that the Food Inspector who took the sample of milk was appointed under the old Act This Act was repealed by the Central Act, the Prevention of Food Adulteration Act, 1954, (Act 37 of 1954), which came into force on the 1st of June, 1955 No Food Inspectors were appointed under the Central Act at the time when the offence took place, hence the Food Inspector who took the sample was not competent to function as Food Inspector or to do any of the acts prescribed by law We are

unable to accept this contention, as it ignores the provisions of section 6 of the General Clauses Act, 1897 Section 6 of the General Clauses Act 1897, lays down that—

> where any Central Act repeals any enactment then unless a different intention appears, the repeal shall not
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under

There can be no manner of doubt that the Food Inspector who acted in the present case was appointed under the previous Act, and his appointment was an act duly done under the said Act After the coming into force of the new Act it would naturally take time before fresh Food Inspectors could be appointed Until fresh apointments are made appointments duly made under the previous Act must be considered to be valid and good In this view of the matter we are of opinion that the Food Inspector who took the sample of the adulterated milk must be taken to be a person competent to act as such when the offence took place

Learned counsel for the respondent further advanced a similar argument about the incompetency of the Public Analyst to conduct any analysis under the new Act This argument can be answered effectively in a similar manner as the argument relating to Food Inspectors

In the end, the learned counsel for the respondent argued that no proper complaint was lodged in the present case In this connection he invited our attention to section 20 of the Prevention of Food Adulteration Act 1954 Section 20 runs as follows

> (1) No prosecution for an offence under this Act shall be instituted except by or with the written consent of the State Government or a local authority or a person authorized in this behalf by the State Government or a local authority

Having heard the learned counsel for the respondent, we are of opinion that this point also has no substance In

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MUNICIPAL BOARD LUCKNOW v. SHYAM BIHARI

Beg, J.

the present case the complaint was lodged by the local authority namely, the Municipal Board. This complaint has been signed by the Municipal Medical Officer of Health. Learned counsel for the respondent argued that the Medical Officer of Health, Municipal Board, was not authorized to launch complaints on behalf of the Board. In reply the learned counsel appearing for the Municipal Board invited our attention to an order by the Administrator which empowers the Medical Officer of Health, Municipal Board, to launch prosecutions of this nature. It may be mentioned that this point was not taken by the respondent at the stage of the trial court, otherwise the relevant order might have been brought on record. As this point was taken for the first time at this stage we are taking notice of this fact. For the above reasons it cannot be said that the complaint in the present case was not made by the authority competent to prosecute.

No other point was urged before us.

The net result of the findings given by us above is that the acquittal of Shyam Behari must be set aside. We may mention that there is ample evidence on record to support the conviction of the respondent on merits. Sri O. P. Mehrotra, (P. W. 1), Food Inspector, has proved the fact that he purchased the milk from the shop of the respondent and he took the sample. His statement is corroborated by R. S. Gupta, (P. W. 3), and the report of the Public Analyst that the milk was adulterated. Two defence witnesses were produced on behalf of the respondent. Their evidence has rightly been rejected by the trial court. We are of opinion that they are unreliable witnesses.

We accordingly allow this appeal and set aside the acquittal of the respondent. We restore the order of the trial court and, finding the respondent guilty of having committed an offence under section 7/16 of the Prevention of Food Adulteration Act, 1954, sentence him to a fine of Rs. 600 or in the alternative to undergo simple imprisonment for a period of four months.

Appeal allowed.

CRIMINAL REVISION

Before Mr Justice Beg and Mr Justice V D Bhargava

1958

October 1

SHEO PRASAD

v

STATE

False information to a public officer—*Prosecution for—Authority competent to file the complaint—Objection to prosecution when to be taken—Indian Penal Code* 1860 *s* 182—*Code of Criminal Procedure,* 1898 *ss* 195 *and* 537

Where a false complaint made to a public officer is referred to and enquired into by a subordinate officer before whom the said complaint is repeated, the latter is a competent authority, within the requirement of s 195 of the Code of Criminal Procedure to institute the prosecution for the offence under s 182 of the Penal Code

Moreover the objection to the validity of a prosecution for want of the requisite complaint must be raised at the earliest possible opportunity so that the material facts may be brought on record and on failure to do so the order or sentence may well come within the saving enacted by s 537 of the Code of Criminal Procedure

Matan v King Emperor (1) distinguished Observations of *Allenson J in King Emperor v Lachhman Singh* (2) approved

Criminal Revision no 776 of 1956 from an order of B N Nigam Sessions Judge, Agra (as he then was), dated the 10th May 1956

The facts appear in the judgment

B S Darbari for the applicant

The Government Advocate, (M H Faruqi), for the State

The judgment of the Court was delivered by—

V D BHARGAVA J—This is an application in revision which has come to this Court on being referred to a Bench by a learned Single Judge as there was an important question of law involved in the case

The applicant had applied for a licence for a gun to the District Magistrate of Agra That application was

(1) (1910) 7 A L J 1143 (2) (1928) I L R 7 Pat 715

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Sato Prasad v. State

V. D. Bhargava, J.

sent to the Tehsildar for a report. He reported that the applicant was not a fit person for being granted the licence. The applicant again applied to the District Magistrate giving a list of the properties of his and saying that the report given by the Tehsildar was incorrect. That was again sent to the Tehsildar for further report. The Tehsildar again reported that the list of the property given by the applicant was not correct and further that he was not a proper person to whom a licence should be given. Thereupon the applicant sent a petition to the Chief Minister alleging therein that the Tehsildar and the Kanungo had demanded a sum of Rs 200 as bribe for reporting in his favour and since this money had not been paid the report that was given was adverse to him. This petition which was sent to the Chief Minister was sent by the Government to the District Magistrate Agra who forwarded it to Mr M. G. Yazdani Sub Divisional Magistrate Kiraoli, for enquiry. The applicant was called by Mr Yazdani and he enquired about this application and came to the conclusion that the application made against the Tehsildar and the Kanungo was false and he made a report to the Government. Thereafter the applicant was prosecuted under section 182 Indian Penal Code by the Sub Divisional Magistrate and was convicted and sentenced to three months rigorous imprisonment and a fine of Rs 100. In appeal the fine was set aside but the sentence of imprisonment was maintained. Against that order of conviction the applicant has come to this Court.

So far as the question of the report being false is concerned it is a question of fact which is concluded by a finding of the court below and this Court cannot interfere. Learned counsel for the applicant had argued that in this case the prosecution was not proper because as is provided under section 195 Criminal Procedure Code no court can take cognizance of an offence punishable under section 182 Indian Penal Code, except on a complaint filed by the public servant concerned or some other public servant to whom he is subordinate.

It was contended that the public servant concerned to whom the complaint had been made was the Chief

Minister and it was the Chief Minister who could file the complaint and not Mr Yazdani or it should have been any officer superior to the Chief Minister who could have filed the complaint Learned counsel has relied on the decisions in *Sudarsan Barhambhat* v *Emperor* (1) *U Hlaing* v *R P Abangail* (2) *and Sultan* v *C De M Wellbourne* (3) In those cases the statements had been made to police officers Later on complaint was filed by the Sub Divisional Magistrate before whom the statements had been filed Therefore, the facts of this case are different from the facts of the reported cases which have been cited by learned counsel In this case the information had been given initially to the Chief Minister by the applicant When enquiry was being made by Mr Yazdani, the information was again given to him with regard to the demanding of Rs 200 by the Tehsildar and the Kanungo and about his status Therefore, it cannot be said that in the present case the information had not been given to Mr Yazdani on the basis of which he could file the complaint and he would under section 195 Indian Penal Code be the public servant concerned

Reliance was also placed by learned counsel for the applicant on a Division Bench case of this Court in *Matau* v *King Emperor* (4) where the accused had applied for transfer of his case from Tehsildar s court and the applicant made certain unfounded allegations against the Tehsildar He was examined by the Sub-Divisional Magistrate and he repeated the allegations made in his application The Bench held that—

> the statement made under such circumstances was not information given to a public officer within the meaning of section 182 Indian Penal Code and the petitioner could not be prosecuted for that statement inasmuch as he was in the position of an accused person and made the statement in answer to questions put by the Sub Divisional Officer

The facts of that case and the present case are different In the previous case the statement was made

(1) A I R 1947 Pat 64 (2) A I R 1937 Rang 232
(3) A I R 1925 Rang 264 (4) (1910) 7 A L J 1143

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by the accused person in a transfer application before the Sub Divisional Magistrate So far as the making of the statement by the accused is concerned he would be protected under section 342 Criminal Procedure Code When the Sub Divisional Magistrate had examined him in the reported case he was being examined as an accused person and, therefore whatever statement he made whether true or false he would not be made liable for that No proceedings could be taken against him on that ground In the present case when the Sub Divisional Magistrate had examined the applicant, he was not in the capacity of an accused person and therefore the facts of the reported case being different in our opinion they do not apply to the facts of the present case

It was further contended that when the statement was made before Mr Yazdani it was not made voluntarily by the accused It was because he was asked questions which he was bound to answer He was bound if at all to answer those questions truthfully and correctly otherwise, it was open to him not to answer the questions if he so liked But if he falsely stated before him that the Tehsildar and the Kanungo had demanded a bribe of Rs 200 and also had given a false statement about his status, then certainly he was giving a false information to Mr Yazdani and proceedings could be taken against the accused whether the statement had been made voluntarily or upon questions put to him This view is supported by a decision of the Patna High Court in *King Emperor* v *Lachhman Singh* (1) The matter was referred to a third Judge on a difference of opinion between two Judges of the Court namely, ADAMI, J and WORT, J ALLANSON (the third Judge) held that the intention contemplated by clause (a) of section 182, Indian Penal Code does not depend upon what is done or omitted to be done by the public servant on a false information given to him but upon what was the intention in the mind of the informant The information referred to in section 182, Indian Penal Code may be either an information which is volunteered or information given in answer to a question We respectfully

(1) (1928) I L R 7 Pat 715

agree with the observations of ALLANSON, J, in the above case

Apart from this fact, this objection had not been taken by the applicant in the court of the trial Magistrate Under the amended Code of Criminal Procedure in view of the Explanation added to section 537 of the Code, this Court has to take into consideration whether any error omission or irregularity in any proceeding under this Code has occasioned a failure of justice The court has also to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings In case the objection could or should have been taken at an earlier stage and was not taken this Court is reluctant to interfere in its revisional jurisdiction This plea could have earlier been taken in the Magistrate s court Then it may have been for the prosecution to produce any letter or correspondence which may have passed between the Chief Minister and the District Magistrate and it may be that this action was taken at the instance of the Chief Minister On the file there is a letter received from the Government by the District Magistrate to the effect that the allegations made by the petitioner against the Tehsildar were serious and the District Magistrate was directed to examine the desirability of taking action against the petitioner for making false complaint and giving wrong declaration about his status The District Magistrate Agra was further informed that the Government desired that such persons who try to seek their ends by such means should be dealt with severely Thereafter the District Magistrate sent the whole file to the Government for sanction and there might have been actually directions by the Chief Minister to file the complaint but since the file is not complete we are not in a position to say whether actually permission had been obtained or not In any event as we are not satisfied on merits we do not think that the conviction can be set aside

Lastly it was urged on behalf of the applicant that after a lapse of about four years it will not be proper to send the applicant to jail for a short period and that

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V D Bhargava J

instead of the sentence of imprisonment a sentence of fine may be imposed upon the applicant We think this request is a reasonable one

We, accordingly while maintaining the conviction of the applicant, set aside the sentence of imprisonment and in lieu thereof we impose a sentence of fine of Rs 800 In default of payment of fine the applicant will undergo rigorous imprisonment for three months With this modification the revision is dismissed The applicant is on bail He need not surrender to his bail provided he pays the fine within a period of two months

Revision allowed with modification

CRIMINAL REVISION

Before Mr Justice Oak and Mr Justice B Dayal

1958

November 14

R C GUPTA
v
STATE

Criminal Trial—*Production of documents in—order for, against the accused—Validity of—Code of Criminal Procedure 1898 s 94—Constitution of India 1950 Art 20 (3)*

An order passed under s 94 of the Code of Criminal Procedure calling upon the accused to produce a document in his possession and likely to be used against him attracts the prohibition laid down under Art 20 (3) of the Constitution—testimonial compulsion—and is therefore bad and liable to be set aside

M P Sharma v Satish Chandra (1) applied *Abdul Salam v State* (2) followed

Criminal Revision No 681 of 1957, from an order of K G Mathur Additional District Magistrate, Agra dated the 21st May 1957

The facts appear in the judgment

N C Upadhya for the applicant

Mohammad Yaqub Siddiqi for the opposite party

(1) A I R 1954 S C 300 (2) Criminal Revision no 735 of 1956 decided on 6th October 1956

The judgment of the Court was delivered by—

OAK, J —The question raised in this criminal revision is whether an order passed by a court under section 94 of the Code of Criminal Procedure attracts the prohibition contained in Article 20 (3) of the Constitution of India The question arises under the following circumstances

Mohan Lal Sharma filed a complaint against R C Gupta under sections 406 477 467 and 201 Indian Penal Code The case was in the stage of an enquiry under section 202 Criminal Procedure Code The complainant applied to the trial court for an order to the police for recovery of certain documents from the possession of the accused under section 96, Criminal Procedure Code Accordingly the trial court issued a search warrant under section 96 Criminal Procedure Code to the Station Officer Kotwali Agra The case was on the file of the Hony Cantonment Bench Magistrates Agra Subsequently the trial court issued a summons to the accused calling upon him to appear either himself or produce some of his subordinates and to produce certain documents in the court An objection was filed on behalf of the accused The main point raised in the objection was that under Article 20 (3) of the Constitution the accused could not be compelled to produce evidence against himself The objection was overruled On February 19 1957, the trial court passed the following order Arguments heard The applicant shall produce documents required to be produced

R C Gupta accused filed a revision application against the trial court s order, dated February 19, 1957 That criminal revision was dismissed by the learned Additional District Magistrate of Agra by his order, dated May 21 1957 He held that there was no violation of Article 20 (3) of the Constitution R C Gupta filed the present criminal revision against the Additional District Magistrate s order, dated May 21, 1957 When the criminal revision came up before a learned Single Judge of this Court, he thought that the case should be

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Oak, J

heard by a Bench of two Judges, in view of the importance of the question of law involved in the case That is how this criminal revision has come up before us

Section 94, Criminal Procedure Code enables a court to issue a summons to produce a document or any other thing Section 96 of the Code empowers the court to issue a search warrant These are different provisions for production of documents before the court Clause (3) of Article 20 of the Constitution runs thus No person accused of any offence shall be compelled to be a witness against himself The question to be considered in the present case is whether Article 20 (3) of the Constitution is contravened when a summons to produce a document is issued against a person who is an accused in a case

A somewhat similar question came up for consideration before their Lordships of the Supreme Court in *M P Sharma* v *Satish Chandra* (1) In that case the question considered by the Supreme Court was the validity of a search warrant issued under section 96 Criminal Procedure Code Their Lordships however had occasion to discuss orders under section 94, Criminal Procedure Code also In paragraph 10 of the judgment in *M P Sharma's* case (1) their Lordships observed thus

> Broadly stated the guarantee in Article 20 (3) is against testimonial compulsion' It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand We can see no reason to confine the content of the constitutional guarantee to this barely literal import A person can be a witness not merely by giving oral evidence, but also by producing documents or making intelligible gestures as in the case of a dumb witness or the like To be a witness is nothing more than to furnish evidence, and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes It follows that the protection afforded to an accused in so far as

(1) A I R 1954 S C 300

it is related to the phrase to be a witness is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained by him

Again their Lordships observed in paragraph 18 thus notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20 (3) as above explained These observations make it clear that the expression to be a witness used in Article 20 (3) of the Constitution has to be read in a wide sense That expression includes furnishing evidence

The learned Assistant Government Advocate relied upon the following sentence appearing in paragraph 17 of that judgment Notwithstanding these assumptions we are unable to read sections 94 and 96 (1), Criminal Procedure Code, as importing any statutory recognition of a theory that search and seizure of documents is compelled production thereof In that passage their Lordships were merely pointing out that search and seizure of documents could not be treated as compelled production It is to be remembered that *M P Sharma's* case (1) was under section 96 Criminal Procedure Code In the present case we are concerned with an order issued under section 94 Criminal Procedure Code An order under section 94 Criminal Procedure Code, is directed to a person to produce documents before the court. Such an order is clearly an order to furnish evidence Such an order therefore, attracts the prohibition contained in clause (3) of Article 20 of the Constitution

The same view was taken by a Division Bench of this Court in *Abdul Salam v State* (2) Two questions were referred by a learned Single Judge The questions were recast by the Division Bench Question no 1 as recast ran as follows If by an order of the Court the accused person produces a document which contains evidence against him does the production of the document amount to testimonial compulsion within the meaning of Article 20 (3) of the Constitution ? The

(1) A I R 1954 S C 300
(2) Crl Revision no 795 of 1956 decided on 6th October 1958

Division Bench answered this question in the affirmative We respectfully agree with that view

1958

R C GUPTA v STATE

Oak J

It follows that in the present case the trial court was wrong in compelling the accused to produce documents which were likely to be used as evidence against him Since the impugned order contravenes Article 20 (3) of the Constitution that order must be set aside

The Criminal Revision is allowed We set aside the trial court s order, dated February 19 1957 directing the accused to produce documents before the court

Revision allowed

APPELLATE CRIMINAL

Before Mr Justice Mathur

DEV LAL AND OTHERS

v

STATE

1959

January 29

Evidence in preliminary inquiry—*Power of Presiding Judge to treat it as evidence in the case—When and how to be exercised—Code of Criminal Procedure,* 1898 *ss* 288 *and* 540

The power of the Sessions Judge to treat the evidence before the Committing Magistrate as evidence in the case before him must be exercised judicially on sufficient grounds and through a specific decision to that effect

Where the prosecution witnesses are alleged to have been won over and resiled from their evidence at the preliminary inquiry it is the duty of the Judge to test by cross examination or other evidence under s 540 of the Code of Criminal Procedure and satisfy himself of the truth of the allegations made The mere fact that the Sessions Judge chose to treat it as such will not render the evidence admissible through s 288 of the Code and the conviction based on such an evidence must be set aside

Criminal Appeal No 1790 of 1957, from an order of D D Agarwal, Assistant Sessions Judge of Mirzapur, dated the 22nd November, 1957

The facts appear in the judgment

Majid Uddin for the appellant

MATHUR, J.—This is an appeal by Dev Lal and nine others against their conviction of the offences punishable under sections 395 and 412, Indian Penal Code and the sentence of seven years' rigorous imprisonment on each count, the two sentences to run concurrently, in connection with the dacoity committed in the house of Jujhan in village Pandri, police station Khairwa of district Mirzapur, on 1st October, 1955, at 10 p.m.

Jujhan lodged the report of dacoity at the police station the next day at 12.30 p.m. and therein no one was named or suspected to have committed the dacoity. However, as a result of the test identification parades the present appellants were challaned and have been convicted of the offence of dacoity, and also for being in possession of stolen properties, the possession of which was transferred in the present dacoity. The prosecution witnesses including the complainant and his relations supported the prosecution case in the committing court. They then pointed out the appellants and also identified the stolen properties said to have been recovered from the possession of the appellants, at the same time deposing that they did not know the appellants from before the dacoity saw them for the first time in the dacoity and then at the time of the identification proceeding and not in between. A similar statement was made about the stolen properties the complainant and his relations claimed to be the owners of the properties and also asserted that they had been taken away by the dacoits. But during the trial all the eye witnesses except for one resiled from their earlier statements. The learned Sessions Judge admitted their evidence under section 288, Criminal Procedure Code, and on its basis convicted the appellants.

In exceptional circumstances, conviction may be based purely upon the evidence of witnesses admitted under section 288, Criminal Procedure Code. Such instances would be few only when it is established that all the witnesses had been won over and the statements made by them in the committing court were true while

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that made during the trial were false Further in cases where the prosecution solely relies upon the testimony of witnesses made in the committing court, it has to be careful in the conduct of the case It is necessary for the prosecution to properly cross-examine the witnesses and to lead additional evidence if necessary to prove that the statements made by the witnesses during the trial are false Such evidence can, in the discretion of the Sessions Judge, be admitted under section 540, Criminal Procedure Code, on points which would show that the prosecution witnesses were intentionally making a perjured statement in his court

The State counsel did not visualize the difficulties that the prosecution shall have to face in securing the conviction of the appellants on such evidence I would say that the State counsel acted negligently and did not properly cross examine the witnesses For example, Juhan deposed thet Dev Lal accused was the son of his father s sister , that Moharman accused was also his *bua's* son , that Dev Lal was born in his village (Pandri) and lived in the village before shifting to village Pipri and that Debai accused was married to the daughter of Barju Ahir of village Pandri The prosecution should have felt no difficulty in cross-examining the complainant to disprove the alleged relationship But it is of significance that not a single question was put to the complainant on the alleged relationship In case such relationship did exist, the State counsel would, of course, not unnecessarily cross-examine the complainant to disprove facts which in fact existed But if this part of the statement was not true, it was necessary for the State counsel to discredit the complainant by his own cross-examination and by bringing on record sufficient material to prove that no such relationship existed

Juhan also deposed that Bokhai accused had his relationship in the house of Ram Bharos of village Pandri , that Bokhai was the president of villages Gajri, Bangai and others which are near village Pandri , that the home of the maternal uncle of Chhotu accused was in the house of Ram Jiawan of village Pandri , that Sant

Lal (Shanker Lal), Babai, Lai Piare and Bhagwat used to play music in marriages and often came in marriages in village Pandri and in the neighbouring villages and that these accused prepared baskets and sold them in village Pandri In case the statement of Jujhan with regard to the relationship of Dev Lal, Moharman and Babai is correct his statement with regard to other accused persons can also be accepted In other words, the eye witnesses were acquainted with the appellants from before the dacoity If the prosecution can make out a false case with regard to the identification of these appellants, there would be no difficulty in creating evidence with regard to the recovery of the alleged stolen properties

The learned Assistant Sessions Judge, I must say, had not properly controlled the proceeding, nor did he take any interest in the conduct of the case He should have realized the difficulties to be faced in a case of the present nature and should have either himself cross examined the eye witnesses or suggested to the State counsel to cross examine them if the statements of the witnesses were incorrect He would then have known whether the statements made by the witnesses during the trial were true or false, and this would have enabled him to come to a decision whether to act upon the depositions of the witnesses made in the committing court The learned Sessions Judge did not pass any order to indicate to the accused persons that the depositions of the witnesses made in the committing court would be used against them There is no order on the record to suggest that the depositions were being admitted under section 288 Criminal Procedure Code, nor was it indicated to the accused persons during the examination that such statements would be used against them The accused were not confronted with those statements with the result that they would have been considerably handicapped in their defence in not being able to satisfy the court that the depositions made in the committing court were incorrect and could not rightly be admitted under section 288 Criminal Procedure Code

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In this connection it may be observed that the learned Sessions Judge has not indicated the grounds why he was relying upon the depositions made in the committing court. He appears to be under the impression that if the witnesses make one statement in the committing court and resile therefrom during the trial and there is allegation from the side of the prosecution that the witnesses had been won over, the court can automatically accept the statements made in the committing court

There are also certain mis statement of facts in the judgment Jujhan merely stated that Badre Alam had tutored him to tell the truth The learned Sessions Judge wrongly formed an opinion that the complainant was so tutored to deny all the facts and to allege that the Sub-Inspector had threatened him

The statements of the witnesses made in the committing court cannot, for reasons indicated above, be used as substantive evidence under section 288, Criminal Procedure Code There is also no material on the record to prove that the statements made by the witnesses during the trial were incorrect On the other hand, the only inference which can be drawn from the evidence on the record is that two of the appellants are related to the complainant and the others have relations in the village, or used to visit the village from before the dacoity In such circumstances the result of the identification cannot be used against them When the case does not appear to have been prosecuted in good faith, no reliance can be placed upon the alleged recovery of stolen properties It may also be observed that when the accused were being convicted for the offence of dacoity it was not necessary to convict them of the other charge under section 412, Indian Penal Code

The result is that the appeal succeeds and is hereby allowed All the appellants are acquitted of the charge under sections 395 and 412, Indian Penal Code The Court is informed that only Bokhai could avail of the order of this Court granting bail to the appellants His

bail bond shall stand discharged and the other appellants shall be released immediately unless wanted in connection with some other crime

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Appeal allowed

CIVIL MISCELLANEOUS

1959

January 30

Before Mr Justice James

MESSRS PARSHOTTAM DAS CHUNNI LAL

(APPLICANT)

v

BRIJ MOHAN LAL AND OTHERS

(OPPOSITE PARTIES)

Industrial Disputes—*Adjudication of—Delegation of power by State Government to Labour Commissioner and Deputy Labour Commissioner—Scope and validity of—United Provinces Industrial Disputes Act, (XXVIII of 1947) ss 4K and 11 A—Notification dated 20th May 1957—Constitution of India 1950 Art 226*

Section 4K of the United Provinces Industrial Disputes Act casts on the State Government the duty to judge whether an industrial dispute exists or is apprehended and invests it with the power to refer the same for decision to a Labour court or Tribunal as the case may be and the delegation authorized by s 11A is confined to the latter and does not extend to the former which must be discharged by the State Government alone

Accordingly where the Deputy Labour Commissioner purporting to act through the delegation made under s 11 A forms his own opinion regarding the existence of an industrial dispute and refers the same for decision to the Industrial Tribunal the reference so made is not competent and must be quashed

Messrs Sumbhuoli Industries v *State of Uttar Pradesh* (1) dissented from *Pyare Lal Sharma* v *Emperor* (2) explained

(1) 1958 A L J 863 (2) A L R 1948 All 342.

1959

MESSRS. PARMOTTAM DAS CHUNNILAL v. RAM MOHAN LAL.

Civil Miscellaneous Writ No 1266 of 1958

The facts appear in the judgment

Jagdish Swarup and *T N Sapru* for the applicant

The Standing Counsel (*N D Pant*) and *S B Verma* for the opposite parties

JAMES, J —This petition under Article 226 of the Constitution raises an important question of delegated legislation under the U P Industrial Disputes Act (U P Act no 28 of 1947) In order to properly appreciate the issue it raises, it would be necessary to bear in mind two provisions of the Act viz sections 4 K and 11 A and a notification by the State Government published in the *U P Gazette* Sections 4 K and 11 A run as follows

> *Section 4 K*— Where the State Government is of opinion that any industrial dispute exists or is apprehended it may at any time by order in writing refer the dispute or any matter appearing to be connected with or relevant to the dispute, to a Labour Court if the matter of industrial dispute is one of those contained in the First Schedule or to a Tribunal if the matter of dispute is one contained in the First Schedule or Second Schedule for adjudication
>
> *Section 11 A*—"The State Government may, by notification in the official *Gazette*, direct that any power exercisable by it under this Act or rules thereunder shall in relation to such matters and subject to such conditions, if any as may be specified in the direction be exercisable also by such officer or authority subordinate to the State Government as may be specified in the notification"

The notification in question is dated the 20th May 1957 and is in these words

> In exercise of the powers conferred by section 11 A of the U P Industrial Disputes Act 1947 (U P Act no 28 of 1947), the Governor of Uttar Pradesh is pleased to direct that the powers exercisable by the State Government under the following

sections of the said Act shall be exercisable also by the officers mentioned against each

Section	Officer
4 K	1 The Labour Commissioner, Uttar Pradesh
	2 The Deputy Labour Commissioner
6 K	The Labour Commissioner Uttar Pradesh

Now, the petitioner Messrs Parshottam Das Chunni Lal Industries Oil and Dal Mill Hathras, is a firm which runs an oil and *dal* mill at Hathras and employs a number of workmen A dispute in respect of bonus for the year 1955 56 arose beween it and its workmen Conciliation proceedings have proved fruitless, the Conciliation Board submitted the relevant papers to the Deputy Labour Commissioner who after examining them passed the following written order of reference, dated the 26th November 1957

> Whereas I am of opinion that an industrial dispute in respect of the matter hereinafter specified exists between the employers and the workmen of the concern known as Messrs Purshottam Das Chunni Lal Industries Oil and Dal Mill Hathras district Aligarh ,
>
> Now therefore in exercise of the powers conferred by section 4 K of the U P Industries Disputes Act 1947 [U P Act no XXVIII A--150-(ST) 1957] dated May 20 1957 I hereby refer the said dispute to the Industrial Tribunal (General) at Allahabad constituted by G O no U 179 (ST) (1)/XXXVI—A dated April 30, 1957 for adjudication on the following issue
>
> **Matter of Dispute**
>
> Should the employers be required to pay bonus to their workmen for the year 1955 56? If so at what rate and with what details ?"

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MESSRS. PARSHOTTAM DAS CHUNNI LAL v. BHU MOHAN LAL

January 7

The proceedings before the Industrial Tribunal are pending The relevant papers were neither submitted to the State Government, nor did it ever form the opinion that an industrial dispute existed On the contrary, it is admitted that the Deputy Labour Commissioner himself formed the opinion that such a dispute existed and after forming such an opinion he proceeded to refer the dispute to the Industrial Tribunal for adjudication

Through this petition the petitioner firm seeks the quashing of the order of reference and the proceedings which are pending before the said Tribunal The firm agrees that under the aforementioned provisions of the law the Deputy Labour Commissioner was entitled to make a reference to the Tribunal but it contends that he could do so only after the State Government and the State Government alone had formed the opinion that an industrial dispute existed and that by usurping this function of the State Government the Deputy Labour Commissioner has acted without jurisdiction, hence his order of reference is null and void

In my opinion the petitioner firm s contention is sound and ought to prevail Section 4 K contemplates two different things first the State Government has to form the opinion that an industrial dispute exists or is apprehended second, after it has formed the opinion that such a dispute exists or is apprehended it has discretion to refer it to a Labour Court or Tribunal The first to my mind, imposes a *duty* on the State Government , the second confers on it a *power* But a reading of section 11 A shows that it is only the *power* of the State Government that can be delegated, not its *duty*, and indeed a perusal of the notification of the 20th May, 1957 discloses that all that the State Government delegated to the Labour Commissioner or his Deputy was its power under section 4 K nor indeed, was it entitled to do anything more for the contents of section 11 A make it apparent that the legislature whose will alone must prevail deliberately confined the State Government to *a delegation of its powers only* and *not its duties or obligations*, for had the intention been otherwise some such phrase as or duty imposed on it should have occurred

after the words power exercisable by it , and it cannot be disputed that what the statute does not expressly or impliedly authorize is to be taken to be prohibited It necessarily follows that the Deputy Labour Commissioner had no jurisdiction to form the opinion that an industrial dispute existed between the petitioner firm and its workmen According to my reading of section 11 A, the State Government alone was entitled to form such an opinion, and further, that only after it had done so, did the Deputy Labour Commissioner become invested with the right to exercise his delegated powers of referring the dispute to the Tribunal

Lest it be thought that I am making an artificial or arbitrary distinction between a *duty* and a *power* I should like to give two simple illustrations which might help to emphasize the validity of the distinction At cricket an umpire has the *duty* to count number of balls in an over, but a *power* to declare one or more of them no-balls A trial Judge has the *duty* to record the statement of a witness but the *power* to disallow an irrelevant question It would be stretching the legal meaning of the word power too much to say that the cricket umpire has the *power* to count the number of balls in an over, or the trial Judge the *power* to record a witness's statement, indeed, in jurisprudence a power and a duty are correlative terms and certainly not identical Further the distinction which I am drawing is one which the legislature itself acknowledges Two instances should suffice to illustrate this The first is drawn from the Defence of India Act, 1939, section 2 (1) of which conferred certain powers and imposed certain duties on the Central Government Sub-section (4) of section 2 of this Act ran

> The Central Government may by order direct that any power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions if any, as may be specified in the direction be exercised or discharged—
>
> (a) by any officer or authority subordinate to the Central Government, or

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MESSRS PARSHOTTAM DAS CHUNNI LAL v. BRIJ MOHAN LAL

Jafer, J

(b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws by any Provincial Government or by any officer or authority subordinate to such Government

My second illustration is taken from the U P Maintenance of Public Order (Temporary) Act, 1947, an Act of the legislature of our own State Sections 3 (1) and 11 of it provided

Section 3 (1)—' The Provincial Government, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the public safety, or the maintenance of public order or communal harmony it is necessary so to do may make an order (a) directing that he be detained

Section 11— The Provincial Government may, by order direct that any power or duty, which is conferred or imposed on the Provincial Government under this Act be exercised or discharged by any officer or authority

Both Acts *conferred a power* and *imposed a duty* on the Government, and both *authorized the latter to delegate to subordinate authorities both the power and the duty* Sir ALBION RUSSEL K C in the standard work Legislative Drafting and Forms (4th Edition) at page 299 declares to the same effect There is thus high authority for the view that where an enactment imposes a duty and confers a power on the Government, the latter can delegate to a subordinate authority only those of its functions which the enactment permits it to do so that where it is authorized to delegate its power but not its duty or vice versa and does delegate it, the delegatee has jurisdiction only to exercise the power, but not the duty or vice versa, but not both For my part, it is scarcely necessary to emphasize that a statutory provision dealing with delegation must be strictly construed

Hence in my view, so long as section 11 A stands in its present form that is to say authorizes the State

Government to delegate only its power under section 4-K I do not see any escape from the conclusion that the Labour Commissioner or his Deputy has no jurisdiction under section 4 K to perform the *duty* of forming the opinion that an industrial dispute exists or is apprehended—that can be done by the State Government alone It is only after the State Government has performed this duty that the Labour Commissioner or the Deputy Labour Commissioner become entitled to utilize his delegated power under section 11 A read with the notification of the 20th May, 1957, and proceed to refer the dispute to a Labour Court or Tribunal for adjudication

In arguing the contrary the learned counsel for the State and the respondent workmen have relied strongly on the recent decisions of three Single Judges of this Court viz of Hon ble TANDON J in Messrs *Simbhaoli Industries* v *State of U P* (1) of Hon ble DHAVAN, J in *Messrs Upper Doab Sugar Mills Ltd* v *The Labour Commissioner* (2) and of Hon ble R DAYAL, J in *Dr Tara Chand* v *The Rent Control and Eviction Officer Jhansi* (3) I have examined the judgments of these Hon ble Judges with the care and attention that they deserve but it is with the profoundest respect to them that I feel constrained to differ from them for it seems to me that the distinction between the State Government s duties and powers embodied in section 4 K was not brought to their notice adequately nor does it appear to have been argued before them that in forming his opinion about the existence of an industrial dispute the Labour Commissioner was exercising a function which under the Act could not be delegated to him

Learned counsel for the respondents have also relied on the judgment of Hon ble WANCHOO, J in *Pyare Lal Sharma* v *Emperor* (4) That decision was given in a case under the U P Maintenance of Public Order (Temporary) Act of 1947 the relevant provisions of which I have already quoted The judgment draws

(1) 1958 A L J 863

(2) Civil Miscellaneous writ no 664 of 1958 decided on 16th September 1958

(3) Civil Miscellaneous writ no 943 of 1958 decided on 15th December 1958

(4) A I R 1948 All 342

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Jindra, J

attention to the fact that by section 11 the legislature had authorized the Provincial Government to delegate to subordinate authorities both its powers and its duties under section 3 (1) hence it does not contain anything which militates against my views, and I might lay stress on the fact that section 11 A of the Industrial Disputes Act authorizes the delegation solely of powers, not of duties It has been suggested in the course of arguments that the Labour Commissioner or his Deputy are as competent as the State Government to form an opinion regarding the existence of an industrial dispute and further, that if a difference between an employer and his workmen arises it would save much time of the State Government if either of those two officials formed the required opinion The answer to these objections is simple The Labour Commissioner or his Deputy may be competent to form the required opinion but they cannot do so unless permitted by law whereas the relevant provisions of the Industrial Disputes Act which I have quoted earlier do not authorize them to do so, the duty of forming the opinion being cast exclusively on the State Government and I might add that the opinions of the State Government and the Labour Commissioner on the same set of facts need not necessarily be identical As regards the supposed saving of the time of the State Government, it should be sufficient to observe that no amount of economy of time can justify the exercise of a function by an authority which the statute does not recognize

The discussion attempted above compels the conclusion that in the instant case the Deputy Labour Commissioner acted without jurisdiction in forming the opinion that an industrial dispute between the petitioner firm and its workmen existed, and further that although he had the power to refer the dispute to the Industrial Tribunal, he had no legal authority to do so without the State Government itself first forming the requisite opinion The reference to the Industrial Tribunal, and in consequence the proceedings which are pending before the latter are, therefore invalid and must be quashed This is accordingly ordered and the present

petition allowed In view of the highly technical nature of the hearing before me I pass no order as to the costs of the petition

Petition allowed

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MESSRS PARSHOTTAM DASS CHUNNI LAL v. BRIJ MOHAN LAL

JEONS J

CIVIL REFERENCE

*Before Mr Justice Mukerji and Mr Justice Tandon**

1959 *February* 10

RAJA SYED MOHAMMAD SAADAT ALI KHAN (APPLICANT)

v

THE STATE OF UTTAR PRADESH (OPPOSITE PARTY)

United Provinces Agricultural Income Tax Act, 1948, Schedule, Part I paragraphs A and B scope of—

Held that the expression Agricultural Income tax in paragraphs (A) and (B) of Part I of the Schedule in the United Provinces Agricultural Income Tax Act does not include super tax

Civil Reference no 8 of 1955 made by the Members of the Agricultural Income Tax Board U P dated the 20th September, 1955

The facts appear in the judgment

Niamatullah, K B Sinha and *Inyatullah* for the applicant

The Junior Standing Counsel for the opposite party

The judgment of the Court was delivered by—

MUKERJI, J —The Board of Agricultural Income Tax has stated a case in pursuance of the direction issued by this Court by its order dated the 28th of September, 1954

The question that has been referred by the Board for our opinion has been put in the following words

> Whether the expression agricultural income tax in paragraphs (A), (B) of Part I of the Schedule in the Act includes Super tax'?

*Sitting at Lucknow

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RAJA SYED MOHAMMAD SAADAT ALI KHAN v. THE STATE OF UTTAR PRADESH

Mukerji J.

In order to be able to answer the question it is necessary to notice just a few facts

The assessee was Raja Syed Mohammad Saadat Ali Khan of Nanpara which was an estate in the district of Bahraich The assessee was assessed to agricultural income tax for the years 1355 and 1356 Fasli For the first year he was assessed to pay a tax of Rs 2 84 457 while for the latter year he was assessed to pay a tax in the sum of Rs 3 33 209—8 The assessee appealed against the order of the taxing authority and the Commissioner on appeal enhanced the tax so that the assessee was called upon to pay Rs 3,64 743 13 for the year 1355 Fasli and Rs 4 10,213 for 1356 Fasli

Before the Board the assessee raised several contentions which were repelled by the Board One of the contentions which was raised before the Board and in respect of which the Board has made this reference was as to the true interpretation of clause (*b*) in Part I of the Schedule Clause (*b*) says that the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000 The contention of the assessee is that the word income tax in this clause included super tax as well, even though this super tax was calculated according to different rates as provided for in Part II of the Schedule

The Schedule according to which the tax has to be determined has been put into two distinct parts Part I deals with agricultural income tax, that is to say the rates applicable for determining the agricultural *income tax*, while Part II deals with the rates according to which agricultural *super tax* is to be determined Under Part I there are these clauses

Clause (*a*) is in these words

> no agricultural income tax shall be payable on a total agricultural income which does not exceed Rs 3,000

Clause (*b*) is in these words

> the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000

Under Part II there are no such limiting clauses

The main question that therefore falls for our determination is whether agricultural income tax and agricultural super tax are the same entity or, to put it differently whether agricultural super tax can be deemed to be included in the term agricultural income tax In our opinion the language of section 3 and its provisions supply a key to the answer which we have to give to the problem stated above Section 3 is in these words

> (1) Agricultural income tax and super tax at the rate or rates specified in the schedule shall be charged for each year in accordance with and subject to the provisions of this Act and rules framed under clauses (a), (b) and (c) of sub section (2) of section 44 on the total agricultural income of the previous year of every person
>
> (2) Where there is included in the total agricultural income of an assessee any income exempted from agricultural income tax by or under the provisions of this Act the agricultural income tax payable by the assessee shall be an amount bearing same proportion to the total amount of the agricultural income tax which would have been payable on the total agricultural income had no part of it been exempted as the unexempted portion of the total agricultural income bears to the total agricultural income

Section 3 therefore clearly indicates that the tax on agricultural income was categorized under two distinct heads, one called agricultural income tax and the other termed agricultural super tax The intention of the legislature was perfectly clear in keeping these two categories of tax separately for not only have these two categories been separately dealt with for the purpose of computation in so far as their rates are different but they have been spoken of as two separate types of tax The fact that in the Schedule there were two separate parts made is a clear indication to our minds of the intention

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RAJA SIRI MOHAMMAD SADAT ALI KHAN v. THE STATE OF UTTAR PRADESH

Mukerji, J.

of the legislature to keep those two parts separate and that nothing of the one part was going to affect, add to or detract from the provisions of the other part

For the reasons given above we answer the question in the negative

Parties will bear their own costs of this reference

Reference answered

CIVIL MISCELLANEOUS

Before Mr Justice Bhargava and Mr Justice Upadhya

HAZARI LAL (APPLICANT)

v

1959

March 17

INCOME TAX OFFICER KANPUR (OPPOSITE PARTY)

Income escaping assessment—*Time within which power to assess or re-assess exercisable—Saving of action taken or assessment made in "consequence of or to give effect to order of superior courts in appeal or on reference—Scope of—Income Tax Act, 1922 s 23 (3), 31 34 (1) (a) and 34 (3)—Certiorari and Prohibition—Plea of alternative remedy in—Constitution of India, 1950 Art 226*

On 7th March 1952 the Income-tax Officer issued a notice under s. 34 (1) (a) of the Income Tax Act—taxation of income escaping assessment by reason of an omission or failure on the part of the assessee within eight years of the end of the year of assessment—on the assessee in respect of his income for the assessment year 1947-48 and re-assessed him accordingly The Appellate Assistant Commissioner allowed the appeal against this re assessment on the ground that the income in question accrued in the financial year 1945-46 so that the same could not be said to have escaped taxation or be taxed in the assessment year 1947-48

The Income tax Officer accordingly revised his order for the assessment year 1947-48 but went on to issue on 4th January 1956 a fresh notice under s 34 (1) (a) for re assessment of the income for the assessment year 1946-47 The objection that the notice was barred by time and that further proceedings based on the same would be illegal and without jurisdiction being overruled and the assessee coming to the High Court,

th ough a petition under Art 226 of the Constitution for the appropriate relief

Held (i) that the notice in question in order to be in time had to be served on or before 31st March 1955 and was therefore time barred

(ii) that the said notice could not be deemed to be in consequence of or to give effect to any finding or direction contained in the order of the appellate authority and the benefit of the second proviso to sub s (3) of s 34—saving from the time limit any action taken or assessment so made could not accordingly be invoked in this case

(iii) that in order to attract the application of the proviso aforesaid it is necessary—

(a) that the finding or direction contained in the appel late order must be material and necessary for the disposal of the appeal and must essentially be confined to or affect only such persons who are parties to the proceedings or those who are intimately connected with or interested in the pro ceedings and are practically represented by the actual parties

(b) that the notice issued must automatically and directly follow from the said finding or direction without any con sideration or interposition of additional facts or circumstances *S C Prashar* v *Pasunsen Dasarkadas* (1) holding that the second proviso to s 34 (3) offended Art 14 of the Constitution in so far as it affected strangers to the proceed ings amplified

L Shubhkaro Seksaria v *Commissioner of Income tax, U P C P and Behar* (1) *Dunham* v *Glass* (2) In re an *Arbitration between Etherington and Lancashire and Yorkshire Accident Insurance Company* (3) and *Etherington* v *Lancashire and Yorkshire Accident Insurance Company* (4) applied

Held, further that the plea of alternative remedy is not available in a case for prohibition and that even in a case for certiorari it should not prevail where the alternative remedy involves unnecessary hardship and harassment to the petitioner such as the expenses and all inconveniences of further proceed ings including payment of the imposed tax under a taxing law

Civil Miscellaneous Writ no 2227 of 1956

The facts appear in the judgment

P N Pachauri for the applicant

Gopal Behari for the opposite party

(1) 18 I T R 773 (2) L J (1902) 71 K B 683
(3) 24 T L R 784 and on appeal (4) 25 T L R 287

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HAZARI LAL
v
INCOME TAX
OFFICER,
KANPUR

The judgment of the Court was delivered by—

BHARGAVA, J.—The petitioner, Hazari Lal, has invoked the power of this Court under Article 226 of the Constitution for issue of a writ of *certiorari* to quash a notice issued under section 34 of the Income Tax Act by the opposite party to him on the 4th of January 1956 and for issue of a writ of prohibition directing the opposite party to refrain from taking proceedings for re assessment of the petitioner for the assessment year 1946 47. The petitioner was a partner in Firm Hazari Lal Babu Lal at Kanpur, which was registered under section 26 A of the Income Tax Act. He was an assessee in his personal capacity and for the year 1946 47 an assessment order under section 23 (3) of the Income Tax Act was passed in his case on the 31st of August, 1946. For the following assessment year 1947 48 the order of assessment under section 23 (3) of the Act was passed on the 30th of September 1947. On the 15th of January, 1946 the wife of the petitioner purchased a house by means of a registered sale deed for a total price of Rs 19 500 out of which Rs 500 had been paid as earnest money on the 20th of December 1945, and the balance of Rs 19 000 was paid on the 15th of January, 1946, at the time of execution of the sale deed. The opposite party receiving information of the document, issued a notice under section 34 (1) (*a*) of the Income Tax Act on the 27th of March 1952 to the petitioner in respect of his assessment for the year 1947-48 and following up that notice he made a fresh assessment on the 25th of February 1953 by adding a sum of Rs 12,800 to the income which was originally assessed under the assessment order, dated 30th September 1947. The petitioner objected to this re assessment of his income under section 34 for the year 1947 48 but that objection was disregarded. The petitioner then went up in appeal. The Appellate Assistant Commissioner of Income tax, by his order dated 20th July, 1955 accepted the appeal and deleted the addition which had been made in the income for the assessment year 1947 48. He further gave direction to the Income tax Officer to revise the assessment in the light of that order. When giving

this decision the Appellate Assistant Commissioner of Income tax noticed the fact that the purchase of the house by the wife of the petitioner had taken place on the 15th of January 1946, and the entire consideration had been paid by that date so that the previous year available for the investment of the income, which had been made and completed on the 15th of January, 1946 was the financial year 1945 46 The financial year 1945 46 was not the previous year for the assessment year 1947 48 in respect of which the notice under section 34 had been issued in pursuance of which this amount had been taxed as income in the hands of the petitioner On this view, the Appellate Assistant Commissioner of Income tax held that this addition of Rs 12 800 in the assessment for the year 1947 48 was without any justification On receipt of this order of the Appellate Assistant Commissioner of Income tax the opposite party in addition to giving effect to that order by revising the assessment for the year 1947-48, issued a notice under section 34 (1) (a) of the Income Tax Act to the petitioner for re assessment of his income for the assessment year 1946 47 This notice under section 34 in respect of the assessment year 1946 47 was issued on the 4th of January, 1956 The petitioner objected to the issue of this notice principally on the ground that it was barred by time so that the Income tax Officer had no jurisdiction to take proceedings against the petitioner for the assessment year 1946 47 The reply to that objection was sent by the Income tax Officer on the 24th of July 1956, stating that the proceedings were legal and could not be dropped Thereupon this petition was moved by the petitioner on the 30th of August, 1956 In these circumstances, the question, that principally arises for decision by us is whether the notice dated the 4th of January 1956 issued by the opposite party to the petitioner in respect of the assessment year 1946 47 was or was not barred by time

The ordinary period within which a notice under section 34 (1) (a) of the Income Tax Act could be validly served on an assessee under the Income Tax Act as it was

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in 1956 was a period of eight years computed from the last day of the assessment year 1946 47, so that ordinarily a notice under section 34 (1) (a), in order to be in time had to be served on or before the 31st of March 1955 On the other hand the notice now impugned was issued on the 4th of January 1956 long after that period of limitation had expired In these circumstances on behalf of the opposite party reliance was placed on the second proviso to section 34 (3) of the Income Tax Act, which is as follows

> Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re assessment may be made shall apply to re assessment made under section 27 or to an assessment or re assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31 section 33, section 33 A section 33 B section 66 or section 66 A

It was urged on behalf of the opposite party that if this proviso applied to the notice dated 4th January, 1956, and to the further proceedings for assessment or re assessment to be taken in pursuance of it the limitation on the period for issue of notice or for passing an order of assessment or re assessment contained in section 34 (1) or section 34 (3) would not apply, so that it would be permissible for the opposite party to issue a notice and to make an order of assessment or re assessment without being governed by any period of limitation This interpretation of the proviso is in our opinion, perfectly correct but the question that we have to consider is whether this proviso is or is not applicable to the facts of this case

In interpreting this proviso it appears to us that two aspects have to be kept in view when considering the effect of an order under section 31, section 33, section 66 or section 66 A An order under section 31 is passed by the Appellate Assistant Commissioner of Income tax when deciding an appeal An order under section 33 is passed by the Income tax Appellate Tribunal

on a second appeal against the order passed by the Appellate Assistant Commissioner of Income tax under section 31 The opinion of the High Court under section 66 or the decision of the Supreme Court on that opinion of the High Court under section 66 A is also given in proceedings which have passed through the stage of an order by the Appellate Assistant Commissioner of Income tax under section 31 The powers that are exercised by the various authorities which can thus pass orders under section 31 section 33, section 66 or section 66 A, are powers which can be exercised by an appellate authority or by authorities and courts to whom further appeals or references arising out of the appellate order lie The scope of the orders that can be passed is therefore, to be determined by the powers which an Appellate Assistant Commissioner of Income tax has when passing an order under section 31 of the Income Tax Act The very fact that the Appellate Assistant Commissioner of Income tax, when making an order under section 31 is dealing with an appeal filed by an assessee in respect of an assessment order indicates the scope of his jurisdiction to give findings and to make consequential orders The various orders, which an Appellate Assistant Commissioner of Income tax can make are detailed in section 31 (3) though there is no detailed provision about the findings which he can record It appears to us however that from the very nature of the jurisdiction which an Appellate Assistant Commissioner of Income tax exercises it must follow that his power of recording findings is limited to matters which he is called upon to decide when passing an order in appeal in conformity with the details laid down in section 31 (3) Any order passed by him, which is beyond the scope of section 31 (3), would be an order without jurisdiction and, similarly, any finding recorded by him which is not necessary for the purpose of making an order covered by section 31 (3) would be a finding without jurisdiction Further, when applying the second proviso to section 34 (3) of the Income Tax Act the Income tax Officer is only competent to take into account orders which are in conformity with

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the provisions of section 51 (3) and findings which are necessary for passing those orders. Orders which are outside the scope of section 51 (3) or findings which are not at all necessary for making such orders cannot be taken into account by the Income tax Officer for the purpose of relying on the second proviso to section 54 (3) which we are now considering. Shri *Gopal Behari* learned counsel for the opposite party in this connection urged before us that the word 'finding' had nowhere been defined in the Income Tax Act nor had its scope been indicated and we should in interpreting this word as used in the proviso take into account the meaning attributed to that word in common use and should not draw any aid from the word as defined or as limited by the provisions of the Code of Civil Procedure. The word 'finding' in law has a definite meaning and that is indicated by the provisions of the Code of Civil Procedure where it is indicated that a finding is a decision of a court on material questions in issue. Issues are framed on material questions of fact or law and the decision of the court recorded on such issues has been called a 'finding'. We do not think that there is any other wider meaning of the word 'finding' in common use which can be applied to this word as used in the proviso to section 54 (3). The word 'finding' cannot be interpreted so as to include within it any statement of fact contained in a decision irrespective of whether that fact was or was not material to the decision and whether the court or the tribunal, when recording the decision had any occasion to hear parties on that question of fact and to record a decision on it instead of merely recording it as a statement of fact. The word 'finding' interpreted in the sense indicated by us above will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which being necessary for passing the final order or giving the final decision in the appeal has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing. That this interpretation is the proper interpretation to be given to the word 'finding' was also indicated by CHAGLA, C. J. in his

judgment in *S C Prashar* v *Vasantsen Dwarkadas* (1) where the learned CHIEF JUSTICE was considering this very proviso which is for consideration before us In that case the question arose whether right to assess a stranger under section 34 could arise in consequence of or to give effect to any finding or direction contained in an order under section 33 The learned CHIEF JUSTICE remarked

> In the first place it is difficult to understand how a Tribunal can give a finding or a direction affecting a third party who is not before the Tribunal

This indicates that the learned CHIEF JUSTICE felt very doubtful about the competency of the Income tax Appellate Tribunal to record a finding or a direction which affected a third party Clearly, this doubt could arise only because a finding or a direction affecting a third party would not be necessary for properly disposing of an appeal under section 33 when the Income tax Appellate Tribunal would be confining its jurisdiction to deciding matters arising in the appeal before it and would be limited to passing orders of the nature indicated in section 31 It is true that in that case the learned CHIEF JUSTICE did not further pursue the line indicated by this view and preferred to base his decision on a different consideration altogether The argument before the learned CHIEF JUSTICE had mainly centred round the contention that the provision was *ultra vires* Article 14 of the Constitution to the extent that it affected proceedings against any person other than the assessee The learned CHIEF JUSTICE proceeded to examine this contention on the assumption that a finding affecting a person other than an assessee could be recorded and came to the conclusion that if so the proviso offended against Article 14 so far as it affected third parties It appears to us that if the aspect about the power of the Tribunal to record a finding affecting a third party had been examined in full to its logical conclusion it would appear that the Tribunal could not competently record

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such a finding Of course the question would certainly have arisen why the proviso mentions not only assessees but other persons also It has been urged that the use of the expression any person was intended and could be intended only to enlarge the scope of the proviso so as to permit action being taken for assessment or re assessment in consequence of or to give effect to a finding or a direction contained in an order under section 31 section 33 section 66, section 66 A not only against the assessee in the appeal or the proceedings before the appropriate authority but also against any other person We do not think that this was the real intention Interpreting the proviso, all the words used in it have to be given their full significance and it is the cumulative effect of that significance that has to be given effect to As we have indicated above, the very fact that findings are recorded or directions made in exercise of the appellate power or the power which arises in proceedings which have been subject to an appellate decision indicates that the findings and directions must be of the nature which an appellate court can record or make and consequently, the directions must be limited to the nature indicated in section 31 and the findings must be limited to those facts which are necessary for the purpose of giving such directions If this aspect is kept in view, the purpose of the use of the expression any person also becomes clear It is true that in a judicial or *quasi* judicial proceeding the orders that are passed normally govern a person who is party to those proceedings but sometimes the law that is applicable is of such a nature that it might become necessary to give effect to the orders passed even against a person who may not himself directly be a party but who, it may be presumed, has had a sufficient opportunity of being represented in the proceedings through the actual party Some of the examples which appear from the power conferred on the Appellate Assistant Commissioner of Income tax to pass orders under section 31 (3) of the Income Tax Act may in this connection be mentioned Under clause (c) of sub-section (3) of section 31 a case can arise where the Appellate Assistant Commissioner of Income tax inter-

feres with an order cancelling the registration of a firm under sub section (4) of section 23 or refusing to register a firm under sub section (4) of that section If the registration has been refused or cancelled by the Income tax Officer the Appellate Assistant Commissioner of Income tax may allow the appeal and direct registration of the firm The result of that order would be that the income of the firm, whose registration was cancelled or refused, which must have been assessed to tax in the hands of the firm itself will subsequently, on the appeal being allowed have to be assessed to tax in accordance with sub section (3) of section 23 of the Income Tax Act in the hands of the partners Thus as a result of the decision in the appeal against an order under section 23 (4) of the Income Tax Act in which the assessee appellant would only be a firm, the effect of the appellate order would have to be given by assessing tax on the share of each partner in the income of the firm in the assessment proceeding of that partner Such partners would only be covered by the expression any person as they cannot be held to be assessees in the particular appeal which had to be filed by the firm against the order passed in its assessment proceedings under section 23 (4) of the Income Tax Act Another similar case may be where an Income tax Officer passes an order under section 23 A for the assessment of a company deeming certain dividends to have been declared though they were not actually declared Subsequently, on appeal, the amount declared as deemed to have been distributed as dividends might be reduced by the Appellate Assistant Commissioner of Income tax under clause (a) of sub-section (3) of section 33 In the meantime, there is the possibility that the shareholders might have been assessed to tax by including in their incomes dividends deemed to have been received by them being the dividends declared as seemed to have been distributed under section 23 A Naturally it would be necessary to grant to the shareholders the appropriate relief when the order under section 23 A is subsequently varied by the Appellate Assistant Commissioner of Income tax on appeal In such a case to give that relief there would have to be re assess

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ment of each shareholder and, once again he would be a person within the meaning of the expression any person used in the proviso to section 34(3) of the Income Tax Act Two other cases, which appear to be very similar, are cases where the appeals before the Appellate Assistant Commissioner of Income tax are against orders under section 25 A or section 26 (2) of the Income Tax Act i e cases where the point under consideration is the separation of a Hindu undivided family or the *succession of a business* In such cases also, the parties actually in appeal may not subsequently be liable to the tax and the tax may become due as a result of the appellate decision from others or vice versa In the case of a Hindu undivided family, the tax assessed on a Hindu undivided family may become payable by the individual separate members, or the tax found due from the individual members as a result of the appeal may be payable by the Hindu undivided family Similarly, in the case of an order under section 26 (2), the tax found due from a predecessor may later in appeal be found to be payable by the successor or vice versa These appear to us to be cases where the Appellate Assistant Commissioner of Income tax is competent to record findings in an appeal by one assessee affecting persons other than that assessee In such cases however the persons who are affected by the findings or direction in the order of the Appellate Assistant Commissioner of Income tax are only such persons who are not only intimately connected with the assessee but who are according to the provisions of the Income Tax Act, in the matter of their assessment affected by the orders passed in the proceedings for the assessment of the assessee A partner s assessment can often depend on the assessment of the firm Similarly a shareholder s liability to tax on deemed dividends depends on the proceedings taken against the firm under section 23 A It is cases of these types where the expression any person can be applied appropriately if the meaning of the expression finding or direction in the order is considered after taking into account the scope of the jurisdiction of the Appellate Assistant Commissioner of Income tax in the light of the provisions

contained in section 31 In this view further, there can be no findings or directions in an order by an Appellate Assistant Commissioner of Income tax which would affect the rights of total strangers, who can be described as third parties in the manner in which the effect on them was considered by CHAGLA, C J, in the case cited above *S C Prashar v Vasantsen Dwarkadas* (1) This meaning in our opinion should be accepted not only for the reason indicated above but for the further reason that it is one of the principles of interpretation of statutes that the court should be chary of accepting any interpretation which tends towards the invalidity of a provision of law and should prefer an interpretation which would enure to the validity of that law On the interpretation given by us it would appear that no question of the proviso offending against Article 14 of the Constitution would arise The class of persons covered by the expression any person would not be a class who might be accidentally affected by a finding or decision recorded by an Appellate Assistant Commissioner of Income tax The class of persons covered by the expression any person would be persons belonging to those sections who, under the Income Tax Act are intimately connected with and interested in the proceedings taken against the assessee and whose assessments under the Act are affected by the orders passed in those proceedings Such a classification would clearly have a nexus with the object for which the proviso was introduced The object of the proviso was to enlarge the limitation so that orders passed in appeal or findings given when passing those orders in appeal do not become infructuous and can be adequately given effect to This purpose is achieved if the persons who are really interested in those proceedings are also governed by the findings or directions contained in the appellate order The classification is based on their interest in the proceedings against the assessee or on the fact that under the law itself their assessment will be dependent on the orders passed in the proceedings against the assessee There being such a classification, the proviso would be

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a valid one and, consequently, we think that the interpretation we have placed above should be accepted Examining the present case in the light of our views above it is clear that, in this case, the Appellate Assistant Commissioner of Income tax was only competent to record the finding that the sum of Rs 12 800, which was in question in the appeal before him, was not income relevant to the assessment year 1947 48 The question whether this income accrued or was earned in the previous year relevant to the assessment year 1946 47 was not before him for decision, nor was it a point on which it was essential for him to record a finding before appropriately deciding the appeal before him The only material point for his consideration was whether this income was earned by the petitioner in the previous year for the assessment year 1947 48 If it was not so, there was no need at all for the Appellate Assistant Commissioner of Income tax to go into further questions, such as the question whether it was income of such nature as to be liable to income tax or whether it was income earned by the petitioner or by some one else, or whether it was income earned in the previous year relevant to the assessment year 1946 47 These were all questions which were beyond the scope of his jurisdiction when deciding the appeal of the petitioner relating to the assessment year 1947 48 Consequently, for the purpose of applying the proviso to section 34 (3), the Income tax Officer was entitled only to take into account the finding recorded by the Appellate Assistant Commissioner of Income tax that this sum of Rs 12 800 was not the income of the petitioner for the assessment year 1947 48 and the Income tax Officer could not treat as a finding the remark made or the view expressed by the Appellate Assistant Commissioner of Income tax that this sum was the income of the assessee for the assessment year 1946 47 That was a point, as we have said earlier which the Appellate Assistant Commissioner was not called upon to decide and was not a point on which he could competently record a finding

There remains the further question whether the present proceedings being taken against the petitioner

can be justified even on the basis of those findings which the Appellate Assistant Commissioner could competently give in his order under section 31 The relevant finding which the Appellate Assistant Commissioner of Income tax could record, was that this sum of Rs 12 800 was not the income for the assessment year 1947 48 and what we have to examine is whether it can be held that the notice issued under section 34 of the Act to the petitioner in respect of the assessment year 1946 47 can be held to be action taken in consequence of or to give effect to the competent finding or direction contained in the order of the Appellate Assistant Commissioner of Income tax i e, the finding that the sum of Rs 12,800 was not the income for the assessment year 1947 48 On this aspect of the case, we have had some difficulty as we have not found that the exact scope and meaning of the expression in consequence of has at any place been defined or laid down in any decision by the courts In the dictionary the expression in consequence of has been equated with as a result of (see A New English Dictionary by Sir James A H Murray Volume II, containing the letter c, edited by W A Cragie Henery Bradley and C T Onions) or by reason of or as the effect of (see *Websters* New International Dictionary Volume I, Second Edition) We have not been able to derive much assistance from these meanings given in the dictionaries That there is some remote connection between the notice issued under section 34 to the petitioner for the assessment year 1946 47 and the finding of the Appellate Assistant Commissioner that the sum of Rs 12 800 was not the income for the assessment year 1947 48 cannot be denied The finding that this sum was not the income for the assessment year 1947 48 can lead to the conclusion that it may be income for some other year and amongst those some other years, would be included the assessment year 1946 47 Thus a remote connection between the notice issued under section 34 and the finding recorded by the Appellate Assistant Commissioner of Income tax does exist, but we are unable to accept the view that such a remote

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connection by itself can satisfy the requirement that the action taken must be in consequence of the finding The action, which the Income tax Officer took in the proceedings for the assessment year 1947 48 itself so as to delete the amount in accordance with the direction of the Appellate Assistant Commissioner and to reduce the tax assessed accordingly, would certainly be action taken in consequence of the order of the Appellate Assistant Commissioner but in order to take this action for a different year the Income tax Officer had to rely not merely on the finding of the Appellate Assistant Commissioner of Income tax but on other facts or circumstances Under section 34 (1) (a) of the Income Tax Act this notice could be issued against the petitioner by the Income tax Officer only if he had reason to believe that, by reason of the omission or failure on the part of the petitioner to disclose fully or truly all material facts necessary for his assessment for the year 1946 47, this sum of Rs 12,800 had escaped assessment for that year The various factors on which he could act, were thus the omission or failure on the part of the petitioner to disclose fully or truly all material facts for his assessment for the year 1946 47 and thereafter his satisfaction that it was as a result of that omission or failure on the part of the petitioner that the income for the assessment year 1946 47 had been under assessed The finding given by the Appellate Assistant Commissioner of Income tax hardly touches any of these factors The relevant finding which we have taken into consideration is as we have indicated above, merely that this sum of Rs 12,800 was not income for the assessment year 1947-48 In that finding there is nothing to show that there had been any omission or failure on the part of the petitioner to disclose fully or truly all material facts necessary for his assessment for the assessment year 1946 47 There was again nothing in that finding which would show that any income for the assessment year 1946 47 had been under assessed or had escaped assessment All that the finding could indicate was that possibly if this sum represented income it had escaped assessment in some year prior to the assessment year

1947 48 Thus all the main factors, on the basis of which action under section 34 (1) (a) of the Income Tax Act could be taken by the Income tax Officer, had to be found by him quite independently of the finding recorded by the Appellate Assistant Commissioner of Income tax He had to satisfy himself, independently of that finding that this sum of Rs 12,800 respresented taxable income secondly he had similarly to find independently that this sum was income for the assessment year 1946 47 and thirdly he had to find again independently of the finding recorded by the Appellate Assistant Commissioner of Income tax that this under assessment was the result of the omission or failure on the part of the petitioner to disclose fully or truly all material facts necessary for his assessment for the assessment year 1946 47 It would thus appear that the notice issued under section 34 (1) (a) for the assessment year 1946 47 was really a consequence of independent facts which the Income tax Officer had before him in order to justify his belief that the requirements of this provision of law were satisfied The issue of the notice did not automatically or directly follow from the finding which was recorded by the Appellate Assistant Commissioner of Income tax In fact, the finding recorded by the Appellate Assistant Commissioner may have been a reason why the Income tax Officer thereafter started looking for material on the basis of which he could come to believe that the provisions of section 34 (1) (a) were applicable to the assessment of the petitioner for the assessment year 1946 47 The actual applicability of section 34 (1) (a) to the assessment of the petitioner for the year 1946 47, did not arise as a result of the finding recorded by the Appellate Assistant Commissioner It appears to us, therefore that the present notice, dated 4th January 1956 issued to the petitioner cannot be said to be action taken by him in consequence of or to give effect to the finding or direction contained in the order under section 31 passed by the Appellate Assistant Commissioner on 20th July, 1955

This view of ours, though not directly supported

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by is in line with various decisions in which the expres sion in consequence of or as a result of has come up for interpretation before the courts In this Court the expression in consequence of used in section 34 (1) (a) of the Income Tax Act, as it stood before its amendment in 1948, came up for interpretation in the case of *L Shubhkara Seksaria v Commissioner of Income tax, U P, C P and Berar* (1) It was held

> Section 34 of the Income Tax Act requires that the Income tax Officer should have received definite information and that definite information should have led to the discovery that income, profits and gains chargeable to income tax had escaped assessment or had been under assessed or had been assessed at too low a rate or had been the subject of excessive relief

Thus the idea conveyed by the expression in consequence of was interpreted as requiring that the definite information should have led to the discovery In the same judgment, it was further remarked

> There must be a causal connection between the definite information and the discovery, and where there is no such causal connection, section 34 is not applicable

Applying that test to the case before us, we find that we are unable to hold that the finding recorded by the Appellate Assistant Commissioner of Income tax that the sum of Rs 12,800 was not income for the assessment year 1947-48 led to the action taken by the Income tax Officer of issuing notice under section 34 (1) (a) of the Income Tax Act irrespective of the assessment year 1946 47 In fact, there is no causal connection between the two The issue of notice was not caused by the finding It was the result of an independent belief of the Income tax Officer on the various factors which have been mentioned above and which permitted him to issue such notice The equivalent expression as a result of was also interpreted in England in *Dunham v Clare* (2) In that case the expression which came up for interpretation, was where death results from the injury

(1) 18 I T R 773 (2) L J [1902] 71 K B 693

COLLINS, M. R., in his judgment, interpreted the words as follows:

> An applicant for compensation on this scale must prove an injury by accident arising out of and in the course of an employment within the Act, and death as the result of the accident. When that is proved all is done that is necessary to establish a claim to compensation. The question in this case is whether death resulted from the injury. In my opinion that means, whether death in fact resulted from the injury. If it did in fact it makes no matter how improbable or how unnatural the result may have been. The question whether one event results from another involves an examination of the chain of causation. There must be no break in the chain. If there is a break then the final event is not the result of the initial event. But the break must be an actual effective break, a *novus actus interveniens*, from which a new chain of causation commences. To constitute an actual effective break in the chain, the predominant and really efficient cause of the final event must be the new act intervening. Otherwise there is no such break in the chain as to prevent the final event from being the result (though an improbable result) of the initial event.

It appears to us that an application of these remarks of COLLINS, M. R. to the expression 'in consequence of', which as we have said above, has been equated with 'as a result of' leads to the same view which we have expressed above. In the present case, there was clearly a break between the finding of the Appellate Assistant Commissioner of income tax in respect of one assessment year and the action of the Income tax Officer in issuing the notice under section 34 (1) (a) in respect of a different assessment year. The break was that the Income tax Officer had to rely on entirely new facts, which did not exist in the finding in order to arrive at the belief which could justify the issue of the notice. These new facts, which he had to take into account for his belief, were, as we have mentioned earlier, the omission or failure on

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the part of the petitioner to make a full and true disclosure of facts necessary for his assessment that the sum of Rs 12 800 was income liable to income tax and that this income had been earned in the previous year relevant to the assessment year 1946 47 It was clearly an actual effective break as there was intervention of new facts The predominant and effective cause for the issue of the notice was based on the independent new facts and not on any belief based on the finding recorded by the Appellate Assistant Commissioner of Income tax Consequently applying the principle laid down by COLLINS, M R it would appear that we must hold that the action of issuing the notice under section 34 (1) (*a*) for the assessment year 1946 47 was not the result of the finding recorded by the Appellate Assistant Commissioner of Income tax in the appeal in respect of the assessment year 1947-48 MATHEW, L J in the same case indicated what he considered was the effect of the word results He said

> Death may result from an injury without being the probable or the natural consequence of it

This remark gives an indication that the action of the Income tax Officer could be said to be in consequence of the finding if it could be the probable or the natural consequence of it As we have indicated earlier the re assessment for the assessment year 1947 48 by the Income tax Officer was certainly the probable and the natural consequence of the order of the Appellate Assistant Commissioner but the issue of the notice for the assessment year 1946 47 was not the probable or natural consequence of the finding It was, in fact, the consequence of independent facts which the Income tax Officer had reason to believe In this connection we may also refer to the remarks of Mr Justice CHANNELL *in re* an *Arbitration between Etherington and Lancashire and Yorkshire Accident Insurance Company* (1) There the learned Judge had to interpret an insurance policy where the insurance money was payable if the death was not due to intervening cause The learned Judge held

> The expression new cause intervening was the same as other cause intervening and meant some

(1) 24 T L R 784

new and independent cause which might, together with the original cause, produce certain results

This decision was upheld in appeal and the appellate judgment is reported in *Etherington* v *Lancashire and Yorkshire Accident Insurance Company* (1) These remarks indicated again that, in order that an act should be the consequence of some earlier incident there should be no intervention of an intermediate incident which itself does not flow from the original incident In the case before us, if the issue of the notice under section 34 for the year 1946 47 could have followed the finding of the Appellate Assistant Commissioner without the intervention of any new facts or circumstances and as a result of only those facts and circumstances which themselves directly flowed from the competent finding of the Appellate Assistant Commissioner of Income tax, it could have been held that the action of issuing the notice was the consequence of the finding of the Appellate Assistant Commissioner On the other hand what we find is that the finding of the Appellate Assistant Commissioner of Income tax was only remotely connected with the issue of the notice inasmuch as it may be held that it was because of that finding that the Income tax Officer started looking for material to find out in respect of which year he could possibly issue notice under section 34 (1) (a) of the Income Tax Act The issue of the notice itself did not follow the finding or other facts which necessarily arose out of that finding

Consequently on the view we have taken above, we have to hold that the proviso to section 34 (3) of the Income Tax Act does not govern this notice issued against the petitioner on the 4th of January, 1956 As we have already said earlier, the normal period of limitation laid down under section 34 (1) (a) had already expired when this notice was issued and, since the second proviso to section 34 (3) relied upon by the opposite party did not apply, the notice was time-barred when issued

(1) 25 T L R 287

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Before concluding, we may take notice of a point that was raised by learned counsel for the opposite party to the effect that, in this case, there was no patent error on the part of the opposite party of exercising jurisdiction in excess of that vested in him and consequently this was not a fit case where this Court should exercise its powers under Article 226 of the Constitution. We do not think that in the circumstances of this case, this contention has any force. Normally, it is true that this Court is hesitant in interfering with proceedings before authorities specially entrusted with deciding those proceedings by issue of a writ of *certiorari* and the Court refrains from doing so if the Court is of the opinion that the alternative remedy is suitable and convenient. The considerations, however, are different where the principle writ sought is a writ of prohibition. If we were to relegate the petitioner to the ordinary remedy permissible under the Income Tax Act, there is no doubt that the petitioner may be able to obtain relief if he ultimately comes up to this Court by a reference under section 66 of the Income Tax Act. He may even get relief at an earlier stage under section 33 from the Income tax Appellate Tribunal or under section 31 from the Appellate Assistant Commissioner of Income tax but, before he can get that relief he may have to submit to proceedings for re assessment of his income for the assessment year 1946-47. The proceedings for assessment are onerous. The Income-tax Officer, who is to take proceedings, has refused to accept the plea of the petitioner and, if we do not entertain his petition and grant him the relief sought, he would have to incur expenses and undergo all the inconvenience of going again through those preceedings for that assessment. He may also have to pay the tax assessed as a result of those proceedings before he can subsequently obtain relief from the Appellate Assistant Commissioner of Income-tax or the Income tax Appellate Tribunal or from this Court. It appears to us that in such a case it is appropriate for us to exercise our powers under Article 226 of the Constitution so as to relieve him of unnecessary hardship and harassment, so that we consider that on the view taken by us above, the

petitioner should be granted the relief which he has prayed for

As a result, we allow this petition and quash the notice dated 4th January, 1956, issued against the petitioner under section 34 (1) (a) of the Income Tax Act Since we are quashing the notice which automatically has the result that the Income tax Officer cannot now exercise the jurisdiction which we have found he did not possess, we do not think that there is any need for issuing a writ of prohibition The petitioner will be entitled to his costs from the opposite party which we fix at Rs 400 The same amount is assessed as the amount of fee for learned counsel

Petition allowed

CIVIL MISCELLANEOUS

Before Mr Justice Chaturvedi and Mr Justice V D Bhargava

1959

April 13,

SRIPAT NARAIN RAI (PETITIONER)

v

BOARD OF REVENUE AND OTHERS (OPPOSITE PARTIES)

Board of Revenue—Ex parte *order by a Judicial Member rejecting application for revision—Judicial Member appointed and took over as Administrative Member—Competence of the successor to set aside the* ex parte *order and admit revision without notice to opposite parties—U P Zamindari Abolition and Land Reforms Act,* 1951, *ss* 20 232 *and* R 259—*United Provinces Land Revenue Act* 1901 *Rs* 7 219 *and* 220—*Land Records Manual, rr* 182 *and* 190—*United Provinces Tenancy Act* 1939 *s* 273—*Code of Civil Procedure* 1908 *s* 151 *O XLVII rr* 1 4 *and* 5—*Constitution of India* 1950 *Art* 226

An application to the Board of Revenue for the revision of an order under the Zamindari Abolition and Land Reforms Act was dismissed *ex parte* by the Judicial Member concerned The Judicial Member was later appointed and took over as the Administrative Member Board of Revenue His successor on a motion to that effect set aside the *ex parte* order and admitted the revision without notice to the opposite parties

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On a petition for a writ in the nature of *certiorari* to quash the latter order

Held (1) that the Board of Revenue is a court only in so far as disposal of judicial work is concerned A Judicial Member therefore who is transferred to and put in charge of the work on the administrative side of the Board of Revenue cannot be deemed to continue or continue attached to the court for the purposes of O XLVII r 5 of the Code of Civil Procedure so as to enable or require him alone to review his orders passed while acting as a Judicial Member

(2) that s 220 (3) of the United Provinces Land Revenue Act to the effect that a single Member of the Board of Revenue shall not have power to alter or reverse a decree or order passed by Board or any other Member than himself does not extend or apply to proceedings under the Zamindari Abolition and Land Reforms Act

(3) that neither the United Provinces Tenancy Act nor the rules framed thereunder including r 190 of the Revenue Manual apply to revisions under the Zamindari Abolition and Land Reforms Act

(4) that it is competent for one or more of the Judicial Members who constitute the Board for that purpose to review or alter an order passed by the predecessor or predecessors as the case may be

(5) that O XLVII r 4 of the Code of Civil Procedure has no application to a case of this kind and it is open to a court to review and set aside an *ex parte* order of dismissal without notice to the opposite parties

Lalji Singh v *Pyare Lal* (1) applied *Baboo* v *Jagdei* (2) approved *Official Trustee of Bengal* v *Benode Behari Ghose* (3) and *Janaki Nath* v *Prabhatini Dasse* (4) adopted

(6) that proceedings by way of certiorari are not of course and the mere fact that an order was without jurisdiction or that there was an error apparent on the face of the record was not sufficient to justify the issue of this writ it must in addition be established that the impugned order had resulted in injustice to the petitioner

There being no such consideration and the petitioner having had and not availed of the alternative remedy of moving the Board itself for appropriate relief the petition must fail even on that ground

A M Allison v *B L Sen* (5) and *Poonan Singh* v *The Additional Commissioner, Agra* (6) followed

(1) 1956 A L J 235
(2) 1957 R D 286
(3) (1924) I L R 51 Cal 943
(4) (1916) I L R 43 Cal 178
(5) A I R 1957 S C 227
(6) 1957 A L J 195

Civil Miscellaneous Writ No 239 of 1959 The facts appear in the judgment

Bhawani Prasad for the applicant

Surendra Narain Singh for the opposite parties

The judgment of the Court was delivered by—

CHATURVEDI, J —This is a writ petition under Article 226 of the Constitution praying that a writ of certiorari be issued quashing an order of the Board of Revenue dated 19th May 1958

The necessary facts of the case are in a short compass Respondents nos 2 and 3 filed an application under section 20 of the U P Zamindari Abolition and Land Reforms Act for being reinstated to the plots in suit on the ground that they were *adhivasis* The petitioner contested the application and denied that the respondents had acquired *adhivasi* rights The trial court decided the case on 27th February 1954 holding that the respondents had acquired the rights of *adhivasi* The petitioners then went up in appeal to the Commissioner and the Additional Commissioner allowed the appeal by his order dated 4th June 1954 He held that the respondents had not acquired *adhivasi* rights On 17th January 1955 the respondents filed a revision petition before the Board of Revenue This petition appears to have been placed in Chambers of a Member of the Board Mr A N Sapru who dismissed it on 13th April 1955 He dismissed it on the ground that the revision was barred by time inasmuch as the order sought to be revised was dated 4th June 1954, and the revision petition was filed on 17th January 1955 It appears that the Board usually allows a period of four months for filing a revision application According to the respondents they did not come to know of the dismissal of their revision for a long time and it was on 9th January 1958 that respondent no 2 filed an application purporting to be under section 151 Civil Procedure Code praying that the *ex parte* order of the 13th April 1955 be set aside In the meantime Mr A. N

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Sapru had ceased to be a Judicial Member of the Board and was put in charge of the administrative work with headquarters at Lucknow. The application for setting aside that *ex parte* order came up before Mr. Ram Ker Singh, a Judicial Member of the Board, and Mr. Ram Ker Singh allowed the application on 19th May, 1958, without issuing any notice of the application to the petitioner. It would thus appear that the respondents were not heard when the revision application was dismissed and the petitioner was not heard when the dismissal order was set aside. After setting aside the order dismissing the revision, a date was fixed for hearing the revision on merits and notices were ordered to be issued to the parties. Before, however, the revision could be heard by the Judicial Member, the present writ petition was filed on 19th January, 1959, and an interim order was issued by this Court directing the Board of Revenue not to hear and decide the revision till further orders from this Court. The writ petition itself has now come up for final hearing before us.

Learned counsel for the petitioner has urged a number of grounds in support of the writ petition, but we shall only deal with those which are necessary to be decided, because in our view, on some of the points interference by this Court will not be justified, for substantial justice has been done and the revision filed by the respondents has now to be heard and decided on its merits.

The first point that we have to consider is whether Mr. R. K. Singh had any jurisdiction to set aside the order passed by Mr. A. N. Sapru. Learned counsel for the petitioner has contended that the application filed by the respondent on 19th January, 1958, should be treated as an application for review, and not one under section 151 Civil Procedure Code. It does appear that in the application it is stated that there was an error apparent on the face of the record of the case, which is a ground which could be urged under the provisions of Order XLVII, rule 1, Civil Procedure Code. There has been a great deal of controversy before us on the question whether the Code of Civil Procedure applies to

applications for review filed in the Board of Revenue in proceedings under the Zamindari Abolition and Land Reforms Act. But we do not consider it necessary to decide that controversy and shall assume that the Code of Civil Procedure applies to cases for review filed before the Board of Revenue. The relevant rule on the point is rule 5 of Order XLVII. The material words of this rule are:

> Where the Judge or Judges ... continues or continue attached to the court at the time when the application for a review is presented ... such Judge or Judges of the court shall hear the application.

The argument of learned counsel is that Mr. A. N. Sapru still continues to be attached to the court and he was the only Member of the Board of Revenue who was legally authorized to hear and decide the application for review. We do not agree with this contention of the learned counsel. The word 'Court' used in section 5 of Order XLVII is significant and the question that we are to consider in the present case is whether Mr. A. N. Sapru continued to be attached to the court on the date when the review application was allowed by Mr. R. K. Singh. As already stated in the beginning of this judgment Mr. Sapru was relieved of his duties of a Judicial Member of the Board before the application was filed and he was appointed as Administrative Member of the Board with his headquarters at Lucknow. After the appointment as Administrative Member he had no judicial work to perform. That being the position we think it cannot be said that he continued to be attached to the court as such. The Board of Revenue has amongst its members both Administrative and Judicial Members. The Judicial Members dispose of Judicial work of the Board and the Administrative Member deals with the administrative work. The Board of Revenue is not a court while dealing with administrative work and can be said to be a court only as far as disposal of judicial work is concerned. Mr. Sapru, because of his appointment as Administrative Member, ceased to have anything to do with the judicial work of the Board of

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Revenue and as such he was no longer a Member of the Board inasmuch as he was not to do any judicial work. That being the position the provisions of Order XLVII, rule 5 do not make it obligatory that Mr. Sapru should himself have dealt with the application for review and we think the rule has no application to a case like the present.

The next point urged by learned counsel for the petitioner is that the order of Mr. Sapru could have been reviewed or set aside only by two members of the Board and not by any single Member. This contention is based on three grounds urged by learned counsel. The first ground is that sub-section (3) of section 220 of the U. P. Land Revenue Act applies to the case and that sub-section clearly provides that a single Member vested with all or any of the powers of the Board shall not have the power to alter or reverse a decree or order passed by Board or by any Member other than himself. The contention of learned counsel is that this sub-section applies to all cases heard by the Board irrespective of the nature of the case. We do not find it possible to agree with this contention of the learned counsel. The U. P. Land Revenue Act in which this section occurs, deals with matters connected mostly with revenue administration of the State including the assessment and realization of revenue. It does speak of the constitution of the Board of Revenue and according to section 7 of the Act the Board has been authorized to distribute its business and to make such territorial division of the jurisdiction amongst its Members as it may deem fit. Sub-section (2) is important. It says that all orders made or decrees passed by a Member of the Board in accordance with such distribution or division shall be held to be the orders or decrees of the Board. The constitution of the Board with connected matters is dealt with in Chapter II in which section 7 occurs. Chapter III provides for the maintenance of maps and records; Chapter IV for the revision; Chapter V for settlement of revenue; Chapter VI for reassessment or revision of the settlement; Chapter VII for partition etc. of mahals; Chapter VIII for collection of revenue; Chapter IX

for procedure of revenue courts and revenue officers and Chapter X deals with the subject of appeals references and revisions Section 220 occurs in this Chapter Learned counsel for the petitioner conceded that up to the first paragraph of section 219 the provisions of this Chapter were confined to cases arising under the U P Land Revenue Act But he says that the second paragraph of section 219 and sub section (3) of section 220 apply to all cases coming up for hearing before the Board of Revenue As regards the second paragraph of section 219 we think it is sufficient to state that it could not be made to cover all cases coming up before the Board because every enactment the U P Tenancy Act Zamindari Abolition and Land Reforms Act, contains provisions concerning institution of revisions If the second paragraph was made to apply to all cases coming up before the Board of Revenue, the other similar provisions under the other Acts would have to be held to be superfluous Even section 220, sub section (1) obviously refers to cases which have been decided under the United Provinces Land Revenue Act The usual legislative practice is to provide in the Act itself for appeals and revisions which arise under it We see no reason for holding that in the U P Land Revenue Act an extraordinary procedure has been followed and provisions have been inserted as parts of sections 219 and 220 which are of universal application We presume that the usual legislative practice has been followed in the U P Land Revenue Act as well and both sections 219 and 220 are made to apply only to cases which arise under the U P Land Revenue Act The present case arose out of proceedings under the U P Zamindari Abolition and Land Reforms Act and would therefore not be governed by the provisions of sub-section (3) of section 220 of the Land Revenue Act

The other argument advanced by learned counsel to support the contention that only two members of the Board could have set aside the order is that rule 190 of the Rules contained in the Revenue Manual would apply to a case under the Zamindari Abolition and Land Reforms Act as well This rule along with the other

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rules contained in the same Chapter of the Revenue Manual purport to have been made under the U P Land Revenue Act and the U P Tenancy Act and not under the Zamindari Abolition and Land Reforms Act Learned counsel referred to rule 186 of the Rules framed under the Zamindari Abolition and Land Reforms Act in this connection Rule 186 is in the following words

> The provisions contained in the U P Tenancy Act 1939 as regards the hearing and decision of suits under the said Act shall apply to the proceedings under section 252

The present proceedings can be said to arise out of proceedings under section 252 because the question involved was whether the respondents had acquired *adhi vasi* rights But the rule only says that the provisions of the U P Tenancy Act are to be applied as regards the hearing and decision of suits It has no application to the hearing of revisions arising under section 252 of the Zamindari Abolition and Land Reforms Act It may be possible to say that suit includes an appeal and the provisions that have been applied to suits should therefore be applied to appeals as well But it is well established that a revision cannot be said to be a continuation of the suit and rule 186 no where purports to apply provisions of the U P Tenancy Act to revisions arising out of cases instituted under section 252 of the U P Zamindari Abolition and Land Reforms Act The provisions of the U P Tenancy Act may or may not apply to appeals arising out of cases instituted under section 252 of the Zamindari Abolition Act, but no rule has been framed to the effect that they can be applied to revisions We therefore, think that neither the U P Tenancy Act nor the rules framed thereunder including rule 190 can be said to apply to revisions arisingg out of cases under section 252 of the U P Zamindari Abolition and Land Reforms Act

The third argument of learned counsel in connection with the above point was that section 273 of the U P Tenancy Act itself contemplates that a review applica

tion cannot be allowed by one Member of the Board of Revenue. Section 273 of the U. P. Tenancy Act has been applied to the Zamindari Abolition and Land Reforms Act by rule 259 of the U. P. Zamindari Abolition and Land Reforms Act. Learned counsel for the petitioner has argued that the rule is invalid and it is the Code of Civil Procedure which applies to review applications. We do not consider it necessary to decide this controversy. If section 273 of the U. P. Tenancy Act has not been legally applied to cases arising out of the Zamindari Abolition and Land Reforms Act, the contention of learned counsel on the interpretation of the section need not be considered at all. Assuming that it has been legally applied to cases arising under the Zamindari Abolition Act, we think that the interpretation of the section of learned counsel is not correct. Section 273 is in the following words:

> The Board on its own motion or on the application of a party to the case may review and may rescind, alter or confirm any decree or order made, by itself or by a single member.

The contention of learned counsel is that it is only the Board as a whole which can review either its own decision or decision of a single Member of the Board. This argument is met by the provisions of section 7 of the U. P. Land Revenue Act. Sub-section (2) of that section, as already stated, says that an order passed by a Member of the Board in accordance with the distribution of work shall be held to be the order or decree of the Board. If in deciding a particular case the Board consists of a single Member, his order can be reviewed by a single Member, because he constitutes the Board even for the purpose of section 273 of the U. P. Tenancy Act. If the word 'Board' is held to mean the entire body of the Members constituting the Board, a difficulty will arise where the order which is sought to be reviewed was passed by two or three of its Members. According to section 273, the Board may review or alter an order passed by itself or by a single Member. But it is not said that the Board can review or alter an order passed

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by two or three Members So, even if the entire Board has the power to review it has the power to review an order passed only by all the Members of the Board or by one Member of it The whole Board will have no power to review or alter an order passed only by all the Members of the Board or by one Member of it The whole Board will have no power to review or alter an order passed by two or three Members The interpretation of the learned counsel for the petitioner therefore cannot be accepted and it has to be held that an order passed by one or more of the Members constituting the Board can be reviewed or altered by one or more Members constituting the Board for the purpose of that case, as provided by section 7 (2) of the Land Revenue Act We, therefore, do not find it possible to accept the contention of learned counsel that in a case arising out of the Zamindari Abolition and Land Reforms Act one single Member of the Board could not have reviewed his own or his predecessors order

The next point urged by learned counsel for the petitioner is that the application made by the respondents under section 151 Civil Procedure Code, for setting aside the order of Mr A N Sapru, could not have been allowed because such an application could be made under Order XLVII rule 1, Civil Procedure Code, and that being the position the inherent powers of the court could not be invoked for the purpose, as there was specific provision in the Code itself for an application like this We do not consider it necessary to decide this point, because this point can be argued before the Board of Revenue while it is hearing the revision on its merits The point can be urged before the Board as a preliminary point at the hearing of the revision

The next point urged by learned counsel for the petitioner is that Order XLVII Civil Procedure Code, is applicable to proceedings for review pending in the Board of Revenue and rule 4 Order XLVII provides that no application for review shall be granted without issuing notice to the other party In the instant case, notice was not issued and the review application was

allowed On this point again the question arises whether Order XLVII Civil Procedure Code applies to proceedings for review before the Board of Revenue when arising out of cases under the Zamindari Abolition and Land Reforms Act But we do not consider it necessary to decide this point The position in this case has been that the respondents revision application was dismissed without hearing them When the respondents applied for setting aside the order the order was vacated without hearing the petitioner So, one *ex parte* order has been vacated by another *ex parte* order The revision is still pending before the Board of Revenue and will have to be heard and decided on its own merits The petitioner could have applied to the Board of Revenue for setting aside the *ex parte* order, dated 19th May 1958 (the order impugned before us) The order had been passed in the absence of the petitioner and the petitioner should have gone to the Board of Revenue and requested the Board to give him a hearing We think there was another remedy open to the petitioner which he failed to avail of His proper course was to approach the Board itself and not to approach this Court directly with the present petition Even on the merits we think the petitioner's contention is not correct

In somewhat similar circumstances a Division Bench of this Court refused to interfere with the order of the Board of Revenue which had been passed *ex parte* and then the *ex parte* order was set aside without notice to the other party The case mentioned above is the case of *Lalpt Singh v Pyare Lal* (1) The learned Judges pointed out that there was no authority which laid it down as a matter of law that when both parties were absent and an order was made against one of them, the court had no jurisdiction to set aside that order without hearing the other party The learned Judges held that the provisions of Order IX rules 9 and 14 Civil Procedure Code provided that no order made under rules 8 and 13 should be set aside without notice to the other side but the said rules were held to apply only

(1) 1956 A L J 335

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to cases in which the order had been passed against one party in the presence of the other party The same view was taken by the High Court of Calcutta in the case of *Official Trustee of Bengal* v *Benode Behari Ghose Mal* (1) In the Calcutta case the appeal was summarily dismissed under Order XLI rule 11 Civil Procedure Code and then on the appellant s application for review the Bench cancelled that order and directed the appeal to be heard again This last order was passed without notice to the respondent But the learned Judges upheld its validity and referred to a practice of the High Court extending over 40 years permitting such a course to be adopted

The next case of the Calcutta High Court is *Janaki Nath Hore* v *Prabhasini Dasee* (2) It is on all fours with the case before us In this Calcutta case the appeal was summarily dismissed by a Division Bench of the High Court But the order of dismissal was set aside on an application for review filed by the appellant without issuing notice to the respondent It was held that this order was valid even in the absence of notices as the expression opposite party in Order XLVII, rule 4, Civil Procedure Code, means a party which was interested to support the order sought to be vacated But the respondent was not considered to be such a person before the appeal had been admitted under Order XLI, rule 11, Civil Procedure Code It appears from the case of *Baboo* v *Jagdei* (3) that the Board of Revenue has also been following the same practice

Apart from the cases mentioned above, we think that substantial justice has been done in the case and an *ex parte* order which the Board of Revenue considered to be wrong has been set aside with the consequence that the revision has been restored to its original number Notices have been issued to both the parties and both the parties have been given opportunity of arguing their cases before the Board of Revenue The revision will now be heard and decided on its merits and it is expected that the party which has law and justice on its side

(1) (1920) I L R 51 Cal 943 (2) (1919) I L R 45 Cal 178
(3) 1957 R.D 266

should succeed If we were to set aside the order of Mr R K Singh dated 19th May 1958 we might be perpetuating an injustice which had been done to the respondents by an incorrect *ex parte* order passed by Mr A N Sapru In such circumstances it is open to this Court to refuse to interfere in its jurisdiction under Article 226 of the Constitution In the case of *A M Allison* v *B L Sen* (2) the learned Judges of the Supreme Court observed

> Proceedings by way of certiorari are not course, (*vide* Halsbury s Laws of England Halsham Edition, Vol 9 paras 1480 and 1481, pp 877 878) The High Court of Assam had the power to refuse the writs for it was satisfied that there was no failure of justice

This Court has also expressed the same view in the case of *Pooran Singh* v *The Additional Commissioner, Agra* (2) The learned Judges observed that the mere fact that an order was without jurisdiction or that there was an error apparent on the face of the record was not sufficient to justify the issue of a writ but in addition it had to be established that the order had resulted in injustice to the petitioner

For the reasons given above we do not think that we should allow this writ petition It is accordingly dismissed, but in all the circumstances of the case we direct that the parties bear their own costs

Petition dismissed

APPELLATE CRIMINAL

Before Mr Justice Mulla and Mr Justice Nigam

DHANPAT
v
STATE

1959

June 5

Criminal Trial—*Prosecution under s 19(f) of the Indian Arms Act 1878—Sanction validity of—Indian Evidence Act,* 1872, *ss 56 and 57 (7) scope of*

* Sitting at Lucknow

(1) A I R 1957 S C 227 (2) 1957 A L J 199

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DHANPAT
v
STATE

In a case under s 19 (f) of the Arms Act it was proved that an unlicenced pistol with some cartridges was found on the person of Dhanpat the appellant when he was arrested When the investigating agency framed the charge sheet in this case it forwarded it to the District Magistrate Bara Banki to obtain his sanction and there is an endorsement on this charge sheet which is as follows

Prosecution sanctioned and then there are some initials underneath this endorsement This charge sheet was exhibited in the court of the Committing Magistrate but somehow it was not exhibited before the trial court

The accused appealed

Held (i) that the procurement of sanction under the second part of s 29 is necessary for a prosecution under s 19 (f), Arms Act in the districts of Avadh

(ii) that the police cannot be held to be empowered to launch such a prosecution without the control exercised by the District authorities

(iii) that the police charge sheet being a public document can be proved by its presentation in original and no other proof is needed As the endorsement of the District Magistrate is on this very document judicial notice of it can be taken under the provisions of sections 56 and 57 (7) of the Indian Evidence Act and there is thus a valid sanction on the record

Case law discussed

Criminal Appeal No 539 of 1957 from an order of B B Misra, II Temporary Civil and Sessions Judge of Bara Banki, dated the 28th September, 1957

The facts appear in the judgment

R C Sharma for the appellant

Additional Government Advocate for the State

MULLA, J —Dhanpat appellant was convicted under section 19 (f) of the Arms Act and sentenced to eighteen months rigorous imprisonment by the Additional Sessions Judge Bara Banki He and two others were prosecuted under sections 399 and 402, Indian Penal Code but all the accused were acquitted on that charge

Dhanpat came up in appeal and his appeal came before one of us The counsel for the appellant contended that the prosecution failed to prove any valid sanction for the prosecution of the appellant under section 19 (f) of the Arms Act and so the appellant could not have

been convicted under section 19 (*f*) of the Arms Act He also in a hesitant way criticised the findings of the trial court So far as the merits of the case are concerned the findings of the trial court are not assailable There is enough evidence on the record of the case to prove that an unlicensed pistol with some cartridges was found on the person of the appellant when he was arrested On facts there was no force in this appeal, but in view of a conflict on the point of law raised in the case, this case was referred to a Divisional Bench of this Court

In order to appreciate the point of law, some facts may be stated When the investigating agency framed a charge sheet in this case it forwarded it to the District Magistrate, Bara Banki, to obtain his sanction and there is an endorsement on his charge sheet which is as follows

Prosecution sanctioned

and then there are some initials underneath this endorsement This charge sheet was exhibited in the court of the Committing Magistrate but for some unknown reason it was not exhibited before the trial court The counsel for the appellant contended that under the provisions of section 29 of the Indian Arms Act no proceedings could have been instituted against the appellant in respect of an offence under section 19 clause (*f*) of the Indian Arms Act without the previous sanction of the District Magistrate and as this sanction has not been proved and there is also no indication that the initials underneath the endorsement are those of the District Magistrate the requirements of law have not been fulfilled and the trial court had no jurisdiction to hear the case against the appellant under section 19 (*f*) of the Indian Arms Act and so the order of conviction passed against the appellant was without jurisdiction and should be held to be null and void

On behalf of the State it was contended that no sanction was necessary for an offence committed in the Bara Banki District and even if it is held that the sanction has not been proved, it will not vitiate the proceedings Secondly it was contended that if a sanction is

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held to be necessary, such a sanction was obtained in this case from the proper sanctioning authority and it was even exhibited in the court of the Committing Magistrate The failure to exhibit this sanction before the trial court does not amount to instituting the proceedings without obtaining the previous sanction of the District Magistrate Thirdly it was contended that the charge sheet was a public document within the meaning of section 74, sub clause (3) of the Indian Evidence Act and the court can take judicial notice of this document under section 57 (7) of the same Act

The following questions arise for determination in this case

(1) Was the obtaining of a sanction necessary before instituting proceedings in this case ?

(2) Can the court take judicial notice of this sanction under section 57 (7) of the Indian Evidence Act, even though it was not exhibited before the trial court ?

On the first question I find myself in agreement with the contention advanced by the counsel for the appellant In my opinion a sanction is necessary before a prosecution can be launched under section 19 (f) of the Arms Act I will cite section 29 of the Indian Arms Act (Act XI of 1878) It runs as follows

> Where an offence punishable under section 19 clause (f), has been committed within three months from the date on which this Act comes into force in any State, district or place to which section 32 clause (2) of Act XXI of 1860 applies at such date, or where such an offence has been committed in any part of India not being such a district State or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or, in a Presidency town, of the Commissioner of Police

A reading of section 29 makes it clear that it has made a distinction between those States, districts and places to

which section 32, clause (2) of Act XXI of 1860 applies and to the rest of India In the case of those States which fall in the first category, the rule of sanction was to be observed only up to three months from the date on which the Indian Arms Act came into force there It ceased to operate after this period of time was over

I have now to consider whether the district of Bara Banki comes under the first part of section 29 or the seond part The counsel for the State has relied on the decision in *Amir Ahmad* v *Emperor* (1) It was held by DANIELS, J, in this case that the sanction of the District Magistrate was not necessary for the prosecution of an offender in any district in the North Western Provinces and he included Oudh in these Provinces Reliance was placed upon a notification issued by the Governor General, dated the 21st of December 1858 extending the provisions of sections 1, 2 and 5 of Act XXVIII of 1857 to the whole of the North Western Provinces The notification runs as follows

> 21st December, 1858 No 5336 The Right Hon ble Governor General has been pleased to extend the provisions of sections 1, 2 and 5, Act XXVIII, 1857 to the North Western Provinces of the Bengal Presidency
>
> His lordship having resolved on disarming such parts of these Provinces as he to the north of the rivers Jamuna and Ganges has further been pleased, under section 24 Act XXVIII 1857, to autho rise a general search and seizure of arms by the Magistrates and Collectors within the tract above specified The Magistrate and Collector may dele gate the same authority to any officer of his estab lishment of rank not lower than a Jamadar

Amir Ahmad's case (1) was followed by two Divisional Bench decisions of this Court These decisions are

King Emperor v *Abdul Ghafoor* (2)

King Emperor v *Angad* (3)

(1) (1926) 24 A L J 30 (2) (1929) 27 A L J 28
(3) (1929) 27 A L J 215

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DALAL, J., observed in the latter decision that the district of Aligarh was an area to which section 32 clause (2) of Act XXXI of 1860 applied. Recently this view was again expressed by a learned Judge of this Court in *Vikram Singh* v. *The State* (1). These Allahabad decisions however can be distinguished for they do not relate to the districts of Oudh but relate to those districts which were undisputedly included in the North Western Provinces. The question before us is whether the district of Bara Banki is a place to which section 32 (2) of Act XXXI of 1860 applied at the date when the Arms Act (Act XI of 1878) came into force.

Section 32 of Act XXXI of 1860 runs as follows:

> *Clause* 1—It shall be lawful for the Governor General of India in Council or for the Executive Government of any Presidency or for any Lieutenant Governor, or with the sanction of the Governor General in Council for the Chief Commissioner or Commissioner of any Province, district or place subject to their administration respectively whenever it shall appear necessary for the public safety, to order that any Province, district, or place shall be disarmed.
>
> *Clause* 2—In every such Province district, or place as well as in any Province district, or place in which an order for a general search for arms has been issued and is still in operation under Act XXVIII of 1857, it shall not be lawful for any person to have in his possession any arms of the description mentioned in section 6 of this Act, or any percussion caps, sulphur gunpowder, or other ammunition without a licence.

It is clear from the language of clause 2 that the necessity of procuring a sanction for prosecuting an offence under section 19 (*f*), Arms Act can only be dispensed with if the district where the offence is committed is one where an order for a general search for arms was made either under Act XXVIII of 1857 and this order continued to be operative, or an order for disarmament of

(1) 1954 A. L. J. 587

that district was made under clause I of section 32 cited above So far as the second alternative is concerned, it is conceded by the State that no such order exists We are thus left only with the first alternative In my opinion the notification no 5336 cited above by its terminology does not cover and was not intended to cover the districts in Oudh It related to only that part of the North Western Provinces which was in the Bengal Presidency and not to Oudh It is true that Oudh was also disarmed but Oudh was never a part of the Bengal Presidency nor was the disarmament of Oudh made either under Act XXVIII of 1857 or Act XXXI of 1860 This question has been fully dealt with by a Divisional Bench of the Oudh Chief Court in *Pukhai* v *Emperor* (1) I need not repeat the reasons given by the learned Judges in that case for coming to the conclusion that the districts of Oudh are not covered by the notification no 5336 *Amir Ahmad s* case (2) was considered but was not followed

An earlier decision given by LINDSAY, J in *Pohap Singh* v *Emperor* (3) may be taken to be almost conclusive on the point In this case *Pohap Singh* was prosecuted under section 19 (*f*) Arms Act without the sanction required by section 29 of the said Act At the preliminary stage of hearing LINDSAY, J, directed the District Magistrate of Hardoi to report whether the sanction was procured or not The District Magistrate reported that as the search was conducted on a search warrant issued by him, no further sanction was considered necessary A paragraph in his report is important and it runs as follows

> It may also be added that so far as Oudh is concerned cases under section 19 (*f*) of the Arms Act would seem to be governed by the first portion of section 29 which has ceased to be operative since the expiry of 3 months after the Act of 1878 came into force In support of this view attention is invited to the Proclamation and orders of the

(1) A I R 1945 Oudh 187 (2) (1926) 24 A L J 30
(3) Criminal Revision Application no 17 of 1912 decided on 14 May 1912

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Chief Commissioner issued in 1858 and subsequent years for disarmament of Oudh, an operation which was still in progress at the end of 1860 and was presumably carried on under the powers conferred successively by Act XXVIII of 1857 and Act XXXI of 1860 as referred to in section 32 (clause 2) of the latter Act

LINDSAY, J., in his decision observed

The District Magistrate however referred to certain proclamations by reason of which he argues that the case was one in which no sanction was required that is to say, he has attempted to show that Hardoi was a district to which section 32, clause (2) of Act XXXI of 1860 applied at the date when the present Arms Act became law I gave the Government Pleader time to examine into the matter and to find out any notification or proclamation which might assist in determining this question I can not say that what has been brought to my notice since has made the question clear There is no doubt that about the year 1858 a general proclamation was issued for the disarmament of Oudh I have read a copy of that proclamation which has been produced before me by the Government Pleader It does not refer of course to Act XXXI of 1860 an Act of subsequent date nor does it refer to the earlier Arms Act (XXVIII of 1857) It is not clear therefore whether this proclamation purported to issue under the provisions of any Act then in force and applicable to Oudh or whether it was merely a proclamation issued as a matter of executive precaution or in connection with the military operations still pending in Oudh at the time

The learned Judge went on and held

Until it is shown that an order specifically made under the provisions of section 32 clause (1) was promulgated in the Hardoi District, I do not think it can be said strictly in law that at the time when the present Arms Act (XI of 1878) came into force

section 32 (clause 2) of Act XXXI of 1860 did apply on that date to the District of Hardoi After this decision the Government of the United Provinces issued circular letter to all the Deputy Commissioners in Oudh and issued a direction that no prosecution should be launched under section 19 (f), Arms Act without securing a specific sanction (G O no 749/VI—811 of 1912 dated 28th February 1913) If the Government of the United Provinces had felt that notification no 5356 cited above was applicable to Oudh it would have placed it before the court in a subsequent case and would not have issued the circular letter It therefore, seems to me that Oudh cannot be included in the North Western Provinces of the Bengal Presidency as held by DANIELS, J, in *Amir Ahmad's* case (1) and I therefore hold that the procurement of a sanction under the second part of section 29 is necessary for a prosecution under section 19 (f), Arms Act, in the districts of Oudh

Even if I had agreed with the view expressed by DANIELS, J, in *Amir Ahmad's* case (1), I would have found it extremely difficult to accept the contention that a prosecution under section 19 (f) Arms Act, can be launched without the procurement of the necessary sanction The rule of sanction as embodied in section 29 Arms Act consists of two parts The second part is the general rule and the first part is an exception While exceptions are to be found in the application of various penal provisions it cannot be disputed that exceptions create a discrimination and as soon as the question of discrimination arises the courts of law have to see whether the discrimination created is based on a reasonable and understandable basis or not This has become necessary after the enactment of the Constitution of India In order to understand the implications of a statute it is always profitable to find out its purpose in its historical background

The Arms Act was enacted in the year 1878 only about 21 years after the Mutiny which is now accepted to be the first concerted effort made by the Indian nationals to shake off foreign domination The ostensible purpose which is quite apparent was to emasculate

(1) (1926) 24 A L J 30

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Indians and to make them incapable of offering any resistance to the alien rulers On the pretext of securing peace and security large areas which had offered some resistance earlier were to be completely disarmed A distinction was therefore made between those areas which had proved to be troublesome in the past or where there were still some groups which were mentally unsubdued and which may become a potential danger in future and the other areas which were comparatively more subdued More drastic steps were, therefore considered necessary for those areas which fell in the first category These areas were to be completely disarmed while a general seizure of arms in the other areas which were less turbulent was not necessary The period of grace given to the areas which were to be disarmed by making a provision that up to three months after the enforcement of this Act sanction would be necessary was really an inducement offered to the residents of these areas to surrender unlicensed arms It was thought that if the possession of unlicensed arms would by itself not make the possessors liable to criminal prosecution these possessors might be tempted to disclose their arms and surrender them Still as these areas were considered to be disturbed areas, this leniency was to be extended only up to a priod of three months On the other hand, in those parts of the country which were considered comparatively peaceful and subdued there was no necessity to offer any inducement to the residents to surrender unlicensed arms It was perhaps for this reason that this classification was made It therefore, appears that it was primarily the needs of an alien government to consolidate its sway over its subjects which prompted this discrimination Whether this discrimination should be maintained to day or not is another question This question is not before us to-day, but I am inclined to the view that no reasonable basis for continuing this discrimination exists Section 29 of the Indian Arms Act was enacted before the coming into force of the Constitution of India and, therefore, the question of inequality of treatment was not before the legislature But after the passing of the Constitution of India, every law is to be tested

on the basis of the provisions of the Constitution and if it does not fulfil the requirements of the Constitution it will have to be held as *ultra vires* of the Constitution to the extent that it violates the fundamental rights given to the citizens of the country It is inconceivable at the present day to find any rational basis for the classification made in section 29 of the Indian Arms Act It cannot be contended with any reason behind it that the districts north of the rivers Jamuna and Ganges are more turbulent than the districts south of these rivers As the general rule is a salutary rule of law and it is the first part of the section 29 alone which creates an unjustifiable classification the general rule should prevail and the exception should be ignored

I therefore feel that the first part of section 29 of the Indian Arms Act is hit by Article 14 of the Constitution of India but it is not necessary for me to decide this question in this case

There is another aspect which would also indicate that the rule of sanction is salutary and it must be followed Section 29 of the Indian Arms Act is not a mere formality and it is a salutary protection against inexpedient prosecutions which may not be desirable in the public interest The legislature by enacting section 29 intended to convey that the prosecution of persons found with unlicensed fire arms was a matter of discretion with the district authorities and the act of possessing such fire arms did not by itself make a person liable to criminal prosecution by the police The reasons for making this safeguard can well be understood There are certain penal statutes in which the legislature makes an objective approach to an offence and there are other offences in which a subjective approach is made Where the offence is of such an anti social character that its commission by itself amounts to a danger to the community an objective approach is made Instances of this objective approach are the enactments which broadly speaking come under the head social legislation or which are enacted to protect the health or other basic rights of the community at large In such cases the plea that an accused did not intend to commit an offence

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and *mens rea* did not exist is seldom open to an offender But the possession of unlicensed fire arms by itself does not amount to such a danger to the community that a person should necessarily be prosecuted in such a case It was for this reason that the rule of sanction was introduced and the District Magistrate was to exercise his discretion after applying his mind to the facts of the case Some instances may be cited where it would be unjustifiable to launch a prosecution merely because an unlicensed arm was found in the possession of an accused For example, A had a licence for keeping a fire arm, but the period for which the licence was given had expired by a few days and during that period the police recovered the fire arm from him and sought the sanction of the district authority for prosecuting him In such a case, if the offender can give a good reason why the licence was not renewed in time, the District Magistrate may in his discretion refuse to sanction the prosecution The offender might explain that for some urgent reason he had to go out of the district or that due to serious illness he was lying in bed and so could not take the necessary steps for the renewal of the licence Such instances can be multiplied It was for this reason that a discretion was vested in the district authorities to sanction a prosecution I, therefore, feel that after the passing of the Constitution of India, the police cannot be held to be empowered to launch these prosecutions without the control exercised by the district authorities

Coming to the next point, I find that this question has been answered by our High Court in several decisions I agree with the view expressed in these earlier decisions of our High Court In my opinion a judicial notice of the sanction can be taken under the provisions of section 57 (7) of the Indian Evidence Act There are three decisions of our High Court which have held the same view Two of these are Divisional Bench decisions and one is a decision by a Single Judge These decisions are, *Qasim Ali* v *Rex* (1), *State* v *Sagarmal* (2) and *Gayadin* v *The State* (3)

(1) 1950 A L J 660 (2) A I R 1951 All 515
(3) 1957 A L J 620

CHANDIRAMANI, J observed in *Qasim Ali's* case (1)

> I have no hesitation in holding that where the question of proof of sanction by a public officer arises, the production of the original document containing the sanction signed by the public officer is itself sufficient to prove the sanction and no other evidence need be given to prove the sanction In such a case it would even be sufficient to produce a duly certified copy of the sanction and no further proof need be given In the present case, therefore, the production of the original sanction of the District Magistrate without further proof was enough to prove the sanction

The same view was expressed in *State* v *Sagarmal* (2) WANCHOO, J, observed in it at page 521

> So far as the proof of the sanction is concerned, it is sure that no one appeared in the witness box to formally prove the sanction In this case, however, the sanction appears on the charge sheet submitted by the police The original sanction is, therefore, available to the court and is a public document A public document can always be proved by production of certified copies prepared under section 76 Evidence Act as provided in section 77 of the same Act As the original was produced in court we do not think that any formal proof was necessary

> The next point urged is that the sanctioning authority namely, the District Magistrate did not apply his mind to the facts of the case as he has simply said Prosecution sanctioned There is, however, no form prescribed for according sanction Where, therefore the sanction appears on the original charge sheet which the District Magistrate must have perused before he gave the sanction, the inference may be drawn that the District Magistrate applied his mind to the facts of the case before he ordered prosecution

The facts of the present case are exactly similar to the facts in *Sagarmal's* case (2) I am therefore of the opinion

(1) 1950 A L J 660 (2) A I R 1951 All 515

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that as the original charge sheet was placed by the prosecuting agency before the Magistrate, the Magistrate initiated proceedings after a valid sanction was placed before him The omission to exhibit this sanction before the trial court would not take away the validity of the initiation of the proceedings against the appellant As regards the absence of proof of the signature of the District Magistrate on this sanction, I think that the case is covered by the provisions of sections 56 and 57 (7) of the Indian Evidence Act BEG J observed in *Gayadin's* case (1) mentioned above as follows

> The last argument advanced on behalf of the applicant is that there is no evidence to prove the signature of the District Magistrate This argument also in my opinion, is untenable Section 56 of the Evidence Act lays down that no fact of which the court shall take judicial notice need be proved Under section 57 (7) of the Act, a court is bound to take judicial notice of the accession to office names titles, functions and signatures of the persons filling for the time being any public office in any State if the fact of their appointment to such office is notified in any official *Gazette* The signature in the present case purports to be that of a public officer who has described himself as the District Magistrate

In this case also the letters D M with a signature which is not decipherable are found at the bottom of the endorsement Judicial notice can be taken of this signature under section 57 (7) of the Indian Evidence Act The only question which remains is whether the words Prosecution sanctioned can also be held to be proved In view of the authorities cited above and in view of the provisions of the Indian Evidence Act which relate to the proof of public documents, I am of the opinion that no formal proof of this endorsement is necessary and it can be held to be proved as an original public document

A contrary view was expressed in *Superintendent and Remembrancer of Legal Affairs, Bengal* v *Moazzam Hossain* (2) It was held in this case by a Bench of the

(1) 1957 A L J 620 (2) A I R 1947 Cal 318

Calcutta High Court that where the legislature has provided for a sanction as a condition precedent to a criminal prosecution such sanction must be strictly proved and no prosecution can be entertained unless the necessary sanction has been legally proved This view was followed by the Madhya Bharat High Court in *State* v *Phool Chand* (1) There is another decision of the Madhya Bharat High Court which is also on the same lines It is *Chandmal* v *State* (2) The Madhya Bharat decisions did not consider the Allahabad decisions at all and they simply followed the Calcutta view The Calcutta view was dissented from in *Qasim Ali s* case (3), and also in *Gayadin s* case (4) mentioned above The Calcutta decision did not consider the provisions of the Indian Evidence Act to which reference has been made above in reaching its conclusions I am therefore, of the opinion that the police charge sheet being a public document could be proved by its presentation in original and no other proof is needed As the endorsement of the District Magistrate is on this very document judicial notice of it can be taken under the provisions of sections 56 and 57 (7) of the Indian Evidence Act There is thus a valid sanction on the record of the case and it cannot be said that the proceedings are vitiated for want of sanction

The last point for consideration is whether the order passed by the District Magistrate is sufficient to infer that the sanction was given after the District Magistrate had applied his mind to the facts of the case No doubt the order passed by the Magistrate is extremely brief and if it is read separately, it does not indicate that the mind was applied to the facts of the case, but where the material involving the accused is given in sufficient detail in the document itself which bears the order of sanction the brevity of the order is not very relevant, for in such a case the material mentioned in the document can safely be deemed to be a part of the sanctioning order This is sufficient to meet the requirements of law for it indicates that the relevant facts were placed

(1) A I R 1956 M B 50
(2) 1949 M B L R 423 (A)
(3) 1950 A L J 660
(4) 1957 A L J 620

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before the sanctioning authority and he exercised his discretion after applying his mind to those facts

For the reasons given above I find no force in this appeal and dismiss it The appellant is on bail He should surrender forthwith to serve out the sentence

NIGAM J —I have had the advantage of reading the judgment of my learned brother I agree with the conclusions and concur in the proposed order I add this note only because I have not found it possible to agree that the first part of section 29 of the Indian Arms Act is hit by Article 14 of the Constitution As this portion of section 29 applies only to parts of country which had been generally disarmed it might be possible to urge that there was a rational basis for classification inasmuch as because of the general disarmament of these parts no peaceful citizens could be expected to be in possession of any unlicensed weapons This question does not arise in this case and it is not necessary for me to discuss the matter in any greater details I however, agree that sanction is necessary for all prosecutions under section 19 (f) of the Indian Arms Act relating to the districts of Avadh

As stated earlier I agree with my learned brother that a sanction was necessary and that the sanction having been duly obtained it could be taken notice of under section 57 of the Indian Evidence Act I concur in the proposed order

By the Court—Accordingly we see no force in this appeal and dismiss it The appellant is on bail He should surrender forthwith to serve out the sentence

Appeal dismissed

CIVIL MISCELLANEOUS

Before Mr Justice V D BHARGAVA *and Mr Justice* MISRA*

UMA SHANKAR RAI AND OTHERS (PETITIONERS),

v

DIVISIONAL SUPERINTENDENT, NORTHERN RAILWAY, LUCKNOW AND OTHERS (RESPONDENTS)

1959

July 28

Writ—*Common Order—Joint or Separate Writ Application—Scope of*

Held that a writ petition can be filed only by one unless the right is joint and inseparable In the case of a common right it is not open to the persons who are affected by a common order, to file a joint writ application

Case law discussed

Civil Miscellaneous Writ no 50 of 1956

The facts appear in the judgment

S D Misra for the applicant

B N Mulla for the opposite party

The judgment of the Court was delivered by—

V D BHARGAVA, J—This application was referred to a Bench of two Judges by one of us on account of the fact that it was a joint application on behalf of four persons In the opinion of the referring Judge a writ petition could be filed only by one unless their right was joint and inseparable In case of a common right it is not open to the persons who are affected by a common order to file a joint writ application Since there was no reported decision of this Court on this matter, and since this matter often arises hence this reference to a Bench There was necessity of referring this case particularly on account of certain remarks made in *Manindra Nath Pal v Municipal Commissioners of Baranagore Municipality* (1) In the opinion of Mr Justice SINHA in that case it was held that this rule was a highly technical one of procedure and should not be introduced in our law

(1) A I R 1956 Cal 291, 295

Sitting at Lucknow

1959

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Bhargava, J.

In our view writ jurisdiction is a special jurisdiction and is for the enforcement of an individual right and there can be no question of the application of Order I of the Code of Civil Procedure to such proceedings. The learned Judge seems to have been influenced by the fact that this country is a poor country to bear litigants expenses. That is a matter for the legislatures to consider in fixing the amount of court fees but we do not see any reason to allow joint applications on that ground. If one wants a redress by way of a writ petition he comes in his individual right and stands on it not jointly with others. This view has also been taken by several of the Single Judges.

In *Rudra Dutta Pandey* and *others* v. *District Board, Bara Banki* (1) one of us had held:

> Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims. There must be separate applications for separate writs. In cases of joint ownership it may be possible by two or more persons to file a joint writ but, as in this present case each individual has been assessed separately to Circumstances and Property Tax each individual has a separate right. A writ petition can only be filed by a person whose interests are directly affected by a statute or an order claimed against and therefore, each individual must file a separate application complaining of his rights which have been affected.

On this ground it was held therein that an application for writ of mandamus on behalf of 35 individuals was not entertainable. In the same case it was observed that in practice also wherever rights have been affected separate writ applications have been filed by different applicants though the same order or statute was being challenged.

In *Madho Prasad* and *another* v. *The District Board, Lucknow* (2) a Bench of this Court took the same view in its order dated the 17th September 1956.

(1) C. M. ist no. 11 of 1956 decided on 22nd August 1956.
(2) C. M. ist no. 30 of 1956, decided on 17th September 1956.

Ferris in his Extraordinary Legal Remedies (1926 Edition) on the basis of American decisions has observed as follows at page 275

> The rule is that persons having a common and joint interest in the subject matter in controversy may be joined as relators while those having separate and distinct rights may not In case of misjoinder the proceeding will be dismissed the common law rule being that misjoinder is fatal to all that the writ must be for all or none that there cannot be one judgment for peremptory mandamus in favour of some of the relators and another judgment in favour of respondent as to others This is so whatever may be their right to join

Under the English law also it is not permissible for two or three applicants not having a joint right to join in a writ petition See Halsbury's Laws of England (Hailsham's Edition, Vol 9) at page 785, paragraph 1325 where this question has been dealt with in the following words

> Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims There must be separate applications for separate writs and this although the several applicants are successors in the office in respect of which the claims arise

In accordance with the observations made above the petition should be dismissed but as this law is not so far known and some of the writ petitions have been admitted without taking that fact into consideration we think the applicants may be entitled to make the election Under the circumstances learned counsel for the petitioners prays that he be given some time to consider the position and find out from his clients on whose behalf he will press the petition He is accordingly given a fortnight's time to choose the applicant Since this case was referred to a Bench on this point we think now the writ petition itself can be disposed of by a Single Judge It need not be listed before a Bench

Application dismissed

CIVIL MISCELLANEOUS

Before Mr Justice Bhargava and Mr Justice Takru

ABDUL WAHID HAJI (PETITIONER)

v

Dr BALKRISHNA VISHUNATH KESKAR AND OTHERS (OPPOSITE PARTIES)

1958

August 19

Parliamentary Elections—*Election Petitions in—Security for—Deposit of under the head of account prescribed by Central Government—Whether sufficient compliance with law*—Representation of the People Act 1951 s 11

Treasury Rules—*Statutory force of—Government of India Act 1935 S 151 26 Geo 5 Ch 2 Certiorari—Whether and when available to correct an order based on a disregard of law—Constitution of India, 1950 Art 226*

The decision of this Court in *Bhawanesh Bhushan Sharma v Election Tribunal, Farrukhabad* (1) viz it the head of account prescribed by the Central Government for the deposit of security of an election petition was correctly shown in a Government Treasury receipt it necessarily followed that the deposit was in favour of the Secretary Election Commission within the meaning and requirement of s 117 of the Representation of the People Act cannot be said to be based on the evidence led in that case and is therefore of general import and application

K Komaraja Nadar v Kunju Thevar (2) relied on

Treasury Rules contained in Vol I of the compilation of the Treasuries Rules published by the Government of India except those in Part XIX are statutory rules framed by the Governor General acting under s 151 (1) of the Government of India Act 1935 and have thus the force of law

Courts and Tribunals are therefore bound to take due cognizance of those rules and any judgment or order based on a disregard or in ignorance of the same suffers from a manifest error apparent on the face of the record and is corrigible through a writ of *certiorari*

T C Basappa v T Nagappa (3) and *Hari Krishna Ramnath v Syed Ahmad Ishaque* (4) followed

Civil Miscellaneous Writ No 1044 of 1958

Iqbal Ahmad for the petitioner

R S Pathak for opposite party no 1

(1) 1958 A L J 443
(2) 1958 S C J 680
(3) 1955 S C R 250
(4) 1955 S C R 1104

1958

ABDUL WAHID HAJI v. DR. BAL KRISHNA VISHUNATH KESKAR

The judgment of the Court was delivered by—

BHARGAVA, J.—Haji Abdul Wahid has filed this petition under Article 226 of the Constitution for the issue of a writ of certiorari to quash a decision of the Election Tribunal, Allahabad, dated the 25th of September, 1957 by which the Tribunal dismissed under section 90 (3) of the Representation of the People Act an election petition which had been presented by the present petitioner challenging the election of opposite party no. 1, Dr. Balkrishna Vishunath Keskar to the House of the People from the Sultanpur Musafirkhana Constituency no. 358. The ground on which the Tribunal dismissed the election petition under section 90 (3) of the Representation of the People Act was that the Government Treasury receipt attached to the election petition by the petitioner when he presented the election petition to the Election Commission did not show that the sum of Rs. 1,000 deposited as security had been deposited in favour of the Secretary, Election Commission. The Tribunal held that the provisions of section 117 of the Representation of the People Act were mandatory and, since the receipt did not have inscribed on it the words "in favour of the Secretary, Election Commission", there was non compliance with the provisions of section 117 of the Representation of the People Act. It is this decision that has been challenged by this writ petition.

When this writ petition came up for hearing before us, a very similar point had already been decided by this Court in *Bhuvanesh Bhushan Sharma* v. *Election Tribunal, Farrukhabad* (1). It was held in that case that, if the head of account prescribed by the Central Government for the deposit of security for costs of an election petition was correctly shown in a Government Treasury receipt, it necessarily followed that the deposit was in favour of the Secretary, Election Commission, and consequently the entry of the head of account was sufficient to show that the deposit was in favour of the Secretary, Election Commission. Subsequent to that decision by this Court, there has also been a decision by the Supreme Court in

(1) 1958 A.L.J. 443

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Bhargava J.

K. Kamaraja Nadar v. *Kunju Thevar and others* (1) where the Supreme Court held as follows:

> "What is of the essence of the provision contained in section 117 is that the petitioner should furnish security for the cost of the petition and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India is at the disposal of the Election Commission to be utilized by it in the manner authorized by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorized by it to receive the same be he the Secretary to the Election Commission or any one else.
>
> If therefore, it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the chalan which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realize the said sum of rupees one thousand for payment of the costs to the successful party it would be sufficient compliance with the requirements of section 117. No such literal compliance with the terms of section 117 is at all necessary as is contended for on behalf of the appellant before us."

Prima facie, these two decisions would show that the order of the Election Tribunal dismissing the election petition in the present case was incorrect because the correct head of account was entered in the Government Treasury receipt which was attached to the election petition. Mr. *Pathak* learned counsel for opposite party no. 1 Dr. Balkrishna Vishwanath Keskar has however urged that the decision of this Court in

(1) 1958 S. C. J. 680

Bhuvanesh Bhushan Sharma's (1) case should not be applied to this case because the decision in that case proceeded on the basis of an examination of certain treasury rules and Government orders and further on the evidence of a Deputy Accountant General who was examined in this Court during the hearing of that case whereas no such evidence is before this Court or was adduced before the Election Tribunal in the present case. In advancing this argument learned counsel relied on the view of the Supreme Court in the case of *K. Kamaraja Nadar* (2) where the Supreme Court gave the decision that it could be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the chalan was such that the Election Commission could on a necessary application made in that behalf be in a position to realize a sum of Rs 1,000 for payment of the costs to the successful party. The Supreme Court having recognized that evidence could be led, Mr. *Pathak* has contended that in the present case also, it was necessary that the petitioner should have led evidence in order to establish the fact that the money deposited by him was at the disposal of the Election Commission to be utilized by it in the manner authorized by law. His further contention is that the treasury rules, government orders and the evidence of the Deputy Accountant General which were taken into account by this Court when deciding the case of *Bhuvanesh Bhushan Sharma* (1) are pieces of evidence which cannot be read in the present case by this Court and could not have been taken into account by the Election Tribunal, and if those pieces of evidence are excluded from consideration the decision of that case that the entry of the head of account was by itself sufficient to show that the deposit was in favour of the Secretary, Election Commission, cannot be arrived at in this case. He has thus tried to distinguish the present case from that case and we have, therefore, to consider whether, in the present case, the Election Tribunal had before it any material or that it was bound to take into account any material and if so, whether that material was sufficient to arrive at the same

(1) 1958 A. L. J. 443 (2) 1958 S. C. J. 680

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decision which was arrived at in the case of *Bhuvanesh Bhushan Sharma* (1)

There can, of course, be no doubt that, so far as the evidence of the Deputy Accountant General in the case of *Bhuvanesh Bhushan Sharma* (1) was concerned, that evidence was confined to that particular case only and any evidence given by him in that case before this Court cannot be taken into account when deciding the present writ petition, nor could it possibly have been taken into account by the Election Tribunal when dealing with the election petition of the present petitioner It has however, to be kept in view that the decision of this Court in *Bhuvanesh Bhushan Sharma's* (1) case did not turn on the evidence of the Deputy Accountant General The judgment of that case itself makes it clear that the actual decision about the effect of the entry of the correct head of account in the receipt was based on the Central Government Treasury Rules and the relevant government orders which were notified for the information of the public The Deputy Accountant General was examined mainly for the purpose of discovering whether there were any other rules and orders which had not come to the notice of the Court and for the additional purpose of interpreting one of the rules in which the word refund had been used The Court was inclined to interpret that word refund in a certain manner and the Deputy Accountant General was questioned to make it sure that that interpretation was correct and was the interpretation which formed the basis of the actual procedure in the treasuries Consequently, even if the evidence of the Deputy Accountant General had been entirely ignored the decision of the Court would have been the same in *Bhuvanesh Bhushan Sharma's* (1) case as the one which has been given after taking some assistance from the evidence of the Deputy Accountant General The result is that, in the present case if the evidence of the Deputy Accountant General, which was confined to the case of *Bhuvanesh Bhushan Sharma* (1) alone is not taken into account but the rest of the material is taken into account, we would still arrive at the same decision

(1) 1958 A L J 443

Mr *Pathak*, has however further contended that even the treasury rules and the government orders governing the deposits in connection with these elections were not tendered as evidence before the Election Tribunal and should not be taken into account by us when deciding the present writ petition This argument has not appealed to us Section 117 of the Representation of the People Act lays down that the deposit is to be made in a Government Treasury and the Government Treasury receipt issued in pursuance of that deposit is to accompany the election petition when it is presented to the Election Commission This section therefore, recognizes that there are government treasuries which issue receipts after accepting deposits In order to properly apply that section it is essential that the rules, which govern such deposits in the treasuries, must be taken into account The question whether those rules are statutory rules or merely departmental rules governing the procedure of the treasuries does not seem to be material Once the Legislature required the filing of a Government Treasury receipt after making a deposit in a government treasury the Election Commission and the Election Tribunal which had to consider whether the receipt was or was not a proper receipt could only do so after looking at the rules governing the procedure in those treasuries In fact, even for the purpose of deciding whether a receipt attached to an election petition is a Government Treasury receipt reference to the rules governing the treasuries will certainly be necessary It appears to us, therefore that from the very nature of the provisions contained in section 117 of the Representation of the People Act an inference arises that the rules governing the treasuries have to be looked into by the authorities who have to decide the validity of the deposit

Apart form this, there is the fact that at least the rules which govern the treasuries, have the force of a statute It appears from the Government of India publication, entitled Compilation of the Treasury Rules, Volume I that the rules contained therein were framed by the Governor General in exercise of the power conferred on

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him by sub section (1) of section 151 of the Government of India Act 1935 which runs as follows

> 151 (1) Rules may be made by the Governor General and by the Governor of a Province for the purpose of securing that all moneys received on account of the revenues of the Federation or of the Province as the case may be shall with such exceptions if any as may be specified in the rules be paid into the public account of the Federation or of the Province and the rules so made may prescribe or authorize some person to prescribe the procedure to be followed in respect of the payment of moneys into the said account the withdrawal of moneys therefrom the custody of moneys therein and any other matters connected with or ancillary to the matters aforesaid

The preface to the Government of India publication, entitled Compilation of the Treasuries Rules Volume I mentions the fact that these treasury rules were framed by the Governor General in exercise of that power There is a further mention that certain executive instructions relating to a source currency coinage and allied subjects which do not fall strictly within the scope of sub section (1) of section 151 of the Government of India Act 1935 were also included in the volume but they were contained in Part XIV of that volume In the present case the provisions contained in Part XIV of the volume are not required to be referred and consequently we need not consider how far those provisions have the force of a statute There is a further mention in the preface that details of departmental instructions on matters of minor importance or on subjects special or peculiar to the department concerned have been left to be prescribed by the departmental regulations and that formal authorization to prescribe procedure in these matters or to make exceptions to general rules in specified cases have been provided where necessary by means of rules included in the Treasury Rules It is to be noticed that in sub section (1) of section 151 of the Government of India Act 1935 it was specifically laid down that the

rules made by the Governor General could prescribe, or authorize some person to prescribe the procedure to be followed in respect of the payment of moneys into the account of the revenues of the Federation the withdrawal of moneys therefrom the custody of moneys therein and any other matters connected with or ancillary to the matters aforesaid The Government of India Act 1935 thus specifically empowered the Governor General either to himself issue instructions on such matters or to authorize some other person to do so Clearly it was under this power conferred on the Governor General by the Government of India Act 1935 that certain treasury rules were made giving formal authorization to prescribe procedures on the matters mentioned in the preface or to make exceptions to general rules in specified cases, where necessary The result is that even departmental instructions on matters of minor importance or on subjects special or peculiar to the department concerned have the force of a statute, having been issued by a person duly authorized by the Governor General in exercise of his powers to grant that authorization under sub section (1) of section 151 of the Government of India Act 1935 All the treasury rules contained in Volume I of the Compilation of the Treasury Rules except those in Part XIV of that volume are thus statutory rules and courts and tribunals when deciding cases have to refer to them in exactly the same manner as they are required to refer to laws properly promulgated In fact these rules stand on the same footing as any properly published law which has come into force In these circumstances it was the duty of the Tribunal to look at these rules not only on the ground that the provisions of section 117 of the Representation of the People Act indicate that it would be necessary to do so but also on the ground that these rules have the force of a statute and any ignorance of these rules by the Tribunal would be a manifest error apparent on the face of the record It is true that it cannot be held in the present case that the Election Tribunal in dismissing the election petition on the ground of non compliance with the provisions of section 117 of the Representation of the People Act,

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committed any error of jurisdiction Interference by this Court in its writ jurisdiction is sought on the ground that the Tribunal committed a manifest error apparent on the face of the record The Supreme Court in *T C Basappa* v *T Nagappa and another* (1) and *Hari Vishnu Kamath* v *Syed Ahmad Ishaque and others* (2) laid down the principle applicable when a court is requested to issue a writ of certiorari on the ground of an error in the decision or determination itself The Supreme Court held

> An error in the decision or determination itself may also be amenable to a writ of '*certiorari*' but it must be *manifest error apparent on the face of the proceedings*, e g, when it is based on clear ignorance or disregard of the provisions of law In other words, it is a patent error which can be corrected by *certiorari* but not a mere wrong decision

In the present case, not only is the principle laid down by the Supreme Court applicable but this case appears to us to be fully covered by the example given by the Supreme Court The Supreme Court held that where a decision is based on clear ignorance or disregard of the provisions of law, it would be a manifest error apparent on the face of the record and the decision would be amenable to a writ of certiorari In the present case the contention of Mr *Pathak* that the treasury rules were not examined by the Election Tribunal would mean that the Tribunal gave its decision on clear ignorance of those rules which had the force of law The example envisages two types of cases One set of cases would be those where there is disregard of the provisions of law, meaning cases in which the relevant provisions of law are brought to the notice of the court or the tribunal but the court or tribunal disregards them The other set of cases are those where the decision is based on clear ignorance of the provisions of law which position can only arise when the provisions of law are not brought to the notice of the court or tribunal at all and the court or tribunal also does not for

(1) 1955 S C R 250 (2) 1955 S C R 1104

itself discover the relevant provisions of law. The contention of Mr. *Pathak* that there was no duty cast on the Tribunal to look at the treasury rules and interfere by issue of a writ of *certiorari* when those rules were not brought to the notice of the Tribunal is therefore clearly untenable. Consequently, if the rules were not brought to the notice of the Tribunal, the decision of the Tribunal would have to be held to be one based on clear ignorance of the provisions of law and this would therefore, be a fit case for correcting that error by issue of a writ of *certiorari* on the principle laid down by the Supreme Court in the two cases cited above.

We may also mention that even on facts we were not quite satisfied that in reality the decision of the Election Tribunal was given in complete ignorance of the treasury rules even though there is no specific mention of those rules in the order dismissing the election petition under section 90 (3) of the Representation of the People Act. In that order there is a reference to another decision given by the Tribunal in Election Petition no. 192 of 1957 (*Mahendra Pal Singh and Sheo baran Singh v. Shri Mohan Lal Gautam and others*), and the decision in that case was followed by the Tribunal in the present case. It is true that the Tribunal made a reference only to that part of the decision in the earlier case where it had been held that the requirements of section 117 of the Representation of the People Act were of a mandatory character. To us, however, it appeared that in fact the Tribunal, when deciding the present case, relied upon its decision in the earlier case not merely on the question whether section 117 of the Representation of the People Act was of a mandatory character but also on the further points discussed in that case on the basis of which the Tribunal had held that there had been failure to comply with the requirements of section 117 of the Representation of the People Act. In the light of this impression, we questioned learned counsel for the parties who had appeared before the Election Tribunal. *Shri Iqbal Ahmad*, who has appeared for the present petitioner before us, had

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also appeared for him before the Election Tribunal He stated that when this election petition came up for hearing before the Election Tribunal the Tribunal made a remark that it had already heard arguments in *Shri Mohan Lal Gautam's* case and asked *Shri Iqbal Ahmad* whether he had anything more to say *Shri Iqbal Ahmad*, who had nothing to add to the arguments that had been advanced in the case of *Shri Mohan Lal Gautam*, thereupon said that he could not say anything at all This version of *Shri Iqbal Ahmad* was borne out by the statement of *Shri R S Pathak* who had appeared on behalf of the respondent in the election petition of *Dr Balkrishna Vishwanath Keskar* The decision of the Election Tribunal in *Shri Mohan Lal Gautam's* case was reported in the *U P Gazette* (*Extraordinary*) dated 8th November, 1957 at page 9 It would appear from that judgment that at the time of deciding that case, the Election Tribunal made a reference not only to the Central Government Treasury Rules but also to the U P Financial Handbook It is true that, during arguments in the present case the points which had been canvassed in the case of *Shri Mohan Lal Gautam*, were not repeated and gone into all over again but in the light of the comment made in the order of the Election Tribunal and the statements made by learned counsel before us we can only arrive at the finding that all the material which was before the Election Tribunal when dealing with the case of *Shri Mohan Lal Gautam* must also be treated as having been before the Election Tribunal when dealing with the election petition of the present petitioner This being the position it is clear that the Election Tribunal had before it all the necessary rules and certain orders issued by or on behalf of the Auditor General of India or the Accountant General of Uttar Pradesh There is of course no mention of the instructions contained in the Government of India Ministry of Finance, letter no D 490 BI/52, dated 22nd January, 1952 which was also taken into account in the case of *Bhuwanesh Bhushan Sharma* (1) but it appears to us that the letter having been published for public information it should also have been taken into account by the

(1) 1958 A L J 443

Tribunal On these materials the decision of the Election Tribunal was clearly wrong for which view we need give no further reasons as all of them are already contained in the judgment of this Court in the case of *Bhuwanesh Bhushan Sharma v Election Tribunal, Farrukhabad* (1) cited above

Mr Pathak in opposing the present petition under Article 226 of the Constitution urged one more point which we may deal with *Mr Pathak* made a reference to a decision of this Court in *Mehnga Ram v Labour Appellate Tribunal of India at Lucknow* (2) to a decision of the Bombay High Court in *Gandhinagar Motor Transport Society v State of Bombay* (3) and to a decision of the Calcutta High Court in *Messrs Satya Narain Transport Co, Ltd v Secretary, State Transport Authority, West Bengal* (4) in which cases it was held that a High Court will not ordinarily issue a writ of *certiorari* on the basis of a point which was not taken or urged before the court or tribunal whose order is sought to be interfered by issue of that writ and urged that in the present case since it was not urged before the Election Tribunal that the entry of the correct head of account in the treasury receipt was sufficient proof to show that the deposit was in favour of the Secretary Election Commission and was a valid deposit that point should not be allowed to be raised in the present writ petition and should not be the basis for the issue of a writ of *certiorari* It appears to us that this argument completely ignores the reason for which we are interfering with the order of the Election Tribunal The point whether the deposit was a valid deposit or whether it suffered from the defect that it was not in favour of the Secretary Election Commission was specifically canvassed before the Election Tribunal That is precisely the point which we are called upon to decide in the present writ petition Even the treasury rules which had to be referred to were before the Election Tribunal Even if they were not before the Election Tribunal, the Tribunal,

(1) 1958 A L R 7 443 (2) I L R [1957] All 108
(3) A I R 1954 Bom 202. (4) A. I R 1957 Cal 438

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made a manifest error apparent on the face of the record in deciding the election petition in complete ignorance of those treasury rules which had the force of law. If the rules are referred to, they show that the decision of the Tribunal is clearly and manifestly incorrect. The petitioner has no other alternative remedy except to come up for relief from this Court under Article 226 of the Constitution. In these circumstances, this is clearly a fit case where the Court should correct the error committed by the Election Tribunal in exercise of its powers under Article 226 of the Constitution.

The result is that this petition is allowed and the order of the Election Tribunal dated 25th September 1957 is quashed. The petitioner will be entitled to his costs of this petition which we fix at Rs. 100. The result of our order is that the election petition of the petitioner shall be deemed to be still pending and the Election Tribunal shall now proceed to decide it in accordance with the law.

Application allowed.

APPELLATE CRIMINAL

Before Mr. Justice Beg and Mr. Justice V. D. Bhargava.

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Insanity—*Test of for exemption from criminal responsibility*—*Indian Penal Code* 1860 s. 84.

The defence of insanity is not available to an accused who is shown to have had a motive for the crime, whose conduct not only at the time of but even before and subsequent to the occurrence clearly shows that he appreciated the nature and consequence of his act and who took rational steps to achieve his object and escape detection and punishment.

The test of insanity in law does not coincide with that in medical science and s. 84 of the Penal Code covers merely those cases where a person not only did not in fact know but was

incapable of knowing the nature wrongfulness or illegality of his act The exemption does not extend to a person who is potentially capable of such understanding or judgment but is precluded from or errs in exercising the same

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Ashraddin Ahmad v. *The King* (1) disapproved *Anandi* v. *Emperor* (2) distinguished

Criminal Appeal no 1012 of 1956 from an order of Ghulam Sabir Sessions Judge of Banda dated the 16th May 1956 in Criminal Sessions Trial no 8 of 1956

The facts appear in the judgment

P C Chaturvedi for the appellant

The Deputy Government Advocate for the respondent

The judgment of the Court was delivered by—

BEG, J —This is an appeal by one Lakshmi who has been convicted under section 302 Indian Penal Code, and sentenced to imprisonment for life and a fine of Rs 100 in default to undergo further rigorous imprisonment for one year

The appellant Lakshmi has been found guilty of having murdered his step brother Chhedi Lal on the 6th October 1954 at about 8 p m in village Baheri police station Girwan district Banda

The prosecution case is that the appellant was addicted to taking *ganja* and wine He used to go about making demands for money from his relations He used to beat his wife and mother He also used to make similar demands from the deceased Chhedi Lal who was opposed to this habit of life of the appellant, and would not accede to his requests to advance to him moneys to enable him to indulge in these vices It is said that in the month of Jeth preceding the incident he had beaten his mother and wife At that time the deceased and other persons had intervened and prevented him from doing so On the appellant's refusal to obey him the deceased had chained him The appellant had run away after breaking the chains Five or six days after that Nichatt Ahir of village Baheri had approached Chhedi Lal deceased, and had told him that when Lakshmi was used to taking *ganja* and *bhang*, why was he not supplying the same to him Chhedi Lal did not

(1) A I R 1949 Cal 182. (2) A. I R. 1223 All 327

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proceed to his request either Thereafter it is said that Lakshmi appellant had stopped speaking to Chhedi Lal

The incident itself is said to have taken place on the evening of the 6th of October 1954 The prosecution story is that at about 8 p m in the night Chhedi Lal had returned to his house after attending to the call of nature He was sitting at his door on the *chabutra* At that time the appellant took a *pharsa* and proceeded towards Chhedi Lal He began to assault Chhedi Lal with the *pharsa* Chhedi Lal raised an alarm A number of persons including Durga Chhakori and Debi Dayal the son of Chhedi Lal reached the spot on hearing the alarm On the arrival of these persons the appellant fled away outside the village taking the *pharsa* along with him Chhedi Lal died within an hour or two

Thereafter Chhedi Lal s son Debi Dayal went to the police station Girwan and lodged a first information report there at 1 o clock in the night In this report Debi Dayal referred to the fact that the appellant was addicted to taking *ganja* and *bhang* He also stated that he had beaten his mother and wife in the month of Jeth, and that his father had tried to stop him from doing that On his refusal to obey him his father and other persons had tied him up with a chain He also stated that five or six days after that Nichari Ahir had brought Lakshmi to his father and had asked him to provide *ganja* and *bhang* for the appellant as he was used to these intoxicants His father had refused to supply the same to him Thereafter Lakshmi appellant had stopped speaking with his father He then narrated the main facts of the incident and stated that on hearing the alarm he had reached the spot and seen the appellant giving *pharsa* blows to his father A number of other persons also reached the spot On being challenged by them the appellant had fled away outside the village with the *pharsa*

This first information report was lodged in the presence of S I Mohammad Ahmed, Station Officer, Girwan. He

went to the spot and prepared an inquest report. He got the statements of the witnesses recorded under section 164 Criminal Procedure Code. The reasons given by him for taking this step was that the witnesses being relations of the appellant he was apprehensive that they might be tampered with. He also stated that the witnesses were going about with the *panchayat* of the appellant and had colluded with him. He searched for the appellant in the village. The appellant was found absconding and could not be arrested. The appellant surrendered in court on the 8th October 1954.

The post mortem examination of Chhedi Lal disclosed the following injuries on his body:

(1) Antero posterior incised wound 3"×¼"×bone underneath cut, 2½" above left eye brow.

(2) Oblique incised wound ¾"×1/6"×bone underneath cut ½" above eye brow.

(3) Contused wound 1¼"×¼"×bone deep along the left eye brow.

(4) Transverse incised wound 3½"×½"×bone deep left cheek beginning from just above the left corner of the mouth running towards the left ear.

(5) Incised wound 5½"×1½"×bone underneath cut ½" below and parallel to injury no. 4.

(6) Transverse incised wound 1¼"×¼"×skin deep front of left shoulder.

Death in the opinion of the doctor was due to shock and haemorrhage as a result of the injuries sustained by the deceased.

The appellant denied the guilt. He denied that he had run away with the *pharsa* after striking Chhedi Lal. He however admitted that he used to smoke *ganja* and people used to stop him from doing so and that he was tied up for that reason.

The main facts relating to the assault made on the deceased by the appellant have not been contested before us by learned counsel for the appellant. The question however which has been seriously argued by him is that the act of the appellant in murdering Chhedi

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Lal fell under the Exception provided by section 84 in Chapter IV of the Indian Penal Code

Having heard learned counsel for the appellant at length, we find ourselves unable to agree with him In order to determine this question the prosecution evidence may be divided into three categories enumerated below

(1) Motive

(2) Conduct of the appellant immediately before the incident, at the time of the incident and shortly after the incident

(3) Subsequent conduct of the appellant and his conduct during the trial of the case

1 *Evidence relating to Motive*

The prosecution case on this aspect of the matter is that the appellant was addicted to *ganja* and wine that he used to make demands for the same from his relations, that he was once brought by Nichan Ahir to Chhedi Lal for this purpose that an actual demand to that effect was made from Chhedi Lal and that Chhedi Lal had refused to accede to this demand Thereafter, the appellant had stopped talking to Chhedi Lal There is a recital of these facts in the first information report itself which was made shortly after the incident At the stage of evidence however, Debi Dayal appears to have been won over He tried to resile from the above position In cross examination, however, he had to admit that he had stated before the Committing Magistrate that the appellant quarrelled with his mother for not giving him money for purchasing *ganja* and *bhang*, and that his father got him tied He also admitted that in the Committing Magistrate s court he had stated that the appellant had demanded wine from the Chamars on the Naumi day, that his father had restrained them from giving wine to him He admitted that these statements were correct He also stated as follows

I got all the facts recorded correctly in the first information report, Ex P I

The evidence of Nichari Ahir, (P W 11), is to the effect that he used to smoke *ganja* occasionally He had also stated in the Committing Magistrate s court that the accused occasionally used to smoke *ganja* with him He also stated in the Committing Magistrate s court that he had taken the appellant to Chhedi Lal and had asked him to provide expenses for his *ganja* In the Sessions Court however, Nichari tried to retile from that statement obviously with a view to help the appellant However on being confronted with it, he had to admit its correctness The said statement was, therefore, brought on record as Ex P 15

On the above evidence we are of opinion that the prosecution have succeeded in establishing that the appellant was addicted to *ganja* and wine, that the appellant used to beat his mother and also his wife, that the deceased Chhedi Lal was opposed to this course of life of the appellant, that Chhedi Lal had refused to give way to his demands of moneys for these vicious purposes and that the appellant was, therefore, nursing a grievance against Chhedi Lal deceased on that score

2 *Conduct of the appellant just before the incident, at the time of the incident and after the incident*

On this aspect of the prosecution case there is the evidence of four eye witnesses, namely Lallu (P W 3), Durga Prasad (P W 4) Chhakori (P W 5) and Debi Dayal (P W 6) Before referring to their statements, we may observe at the very outset that a perusal of their evidence shows that there is a general tendency in all these witnesses to help the appellant This tendency is a distinctly noticable one and is even found in the evidence of Debi Dayal, the own son of the deceased

Lallu (P W 3) stated that he reached the spot on hearing the cries of Chhedi Lal He saw the appellant Lakshmi attacking Chhedi Lal deceased with a *pharsa* Then Debi Dayal Durga and Chhakori challenged the appellant to stop On this he ran away Chhedi Lal was, thereafter, found lying unconscious

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and the region round about that It would also indicate that the appellant had succeeded in inflicting grave injuries on those parts All this is not certainly the conduct of a mad man The above series of acts culminating in the murder of Chhedu Lal disclose a state of mind in which a person is able to realize the serious nature of the act which he is going to commit, to frame a rational scheme to achieve his deadly object and to devise intelligent and clever means to effectuate his fatal purpose by choosing an appropriate occasion by selecting a suitable weapon, and by delivering calculated blows backed with force and directed at specific vital spots of the body in such a manner as to bring about death as a certain result of the various deeds After having committed the murder the appellant fled away from the scene of his activity He left the village taking away the blood stained *pharsa*, which provided a strong evidence against the appellant This again indicates that the assailant's mental faculties were working at the time so that he was able to realize not only the serious nature of his act but also its criminal tenor He did all this with a view to obliterate all evidence of his crime, to enable him to escape the arms of law and to shield himself

8 The conduct of the appellant after the incident and during the trial

The conduct of the appellant further shows that the same night he had approached one Raja Bhaiya (P W 12) at about midnight and made a request to him that he might be allowed to sleep there Raja Bhaiya also tried to help the appellant in this regard He tried to resile from the above version but when confronted with his previous statement he had to admit the above facts The appellant had intelligence enough to choose midnight hour for the purpose of concealing himself in the house of a man where, he thought, he might not be traced

Further, during the long period beginning from the stage of investigation and inquiry and ending with the stage of trial and appeal, there is nothing to indicate that

the appellant was at any time overtaken with any fit of insanity His statement at every stage was such as, according to his own conception was best calculated to subserve his purposes and to advance his own interests These statements are both coherent as well as reasoned Before the Committing Magistrate as well as before the Sessions Court the appellant appears to have a full realization of what was good for his defence He made a clever statement designed according to his own way of thinking to provide him with an escape from the clutches of law He pleaded not guilty He denied having gone to Chhedi Lal or having made any demand from him He further denied having assaulted Chhedi Lal or having disappeared with the *pharsa* from the village or having gone to Raja Bhaiya and made any request to him to give him refuge

An attempt was no doubt made in the trial court to rely on Exs P 4 and P 5, which are reports of the Superintendent of the Jail Banda and his statement Ex D 1 These reports indicate that while in jail he had a complete memory of his parentage residence and caste although he appeared to be indifferent to his surroundings These reports certainly do not make out a case of judicial insanity as envisaged by section 84, Indian Penal Code Incidentally it may be mentioned by us that although these reports were relied on on behalf of the appellant in the trial court his learned counsel argued before us that they were inadmissible and could not be looked into at all Under the circumstances it is not necessary for us to refer to them

To sum up, in the present case there is evidence of motive against the appellant His conduct prior to the incident as well as at the time of the incident does not support the contention that he was insane at the time when the offence was committed His conduct subsequent to the incident also does not lend any support to his contention The conduct history of the appellant in the court of enquiry as well as in the trial court also militate against the contention that the appellant was liable to recurring fits of insanity at short intervals

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Learned counsel for the appellant has cited two cases to support his contention. The first is *Ashiruddin Ahmad* v. *The King* (1). The facts of this case were that the accused had dreamt that he was commanded by someone in paradise to sacrifice his own son of five years. The next morning the accused took his son to a mosque and killed him by thrusting a knife in his throat. He then went straight to his uncle but finding a chaukidar nearby took his uncle to a tank at some distance and slowly told him the story. On these facts it was held by a Bench of the Calcutta High Court that the case of insanity under section 84 Indian Penal Code was made out. It was held in that case that to enable an accused to get the benefit of section 84 he should be able to establish any one of the following three elements, viz. (1) that the nature of the act was not known to the accused, or (2) that the act was not known by him to be contrary to law or (3) that the act was not known by him to be wrong. On the above facts the Bench held that the third element was established by the accused, namely that the accused did not know that the act was wrong. This was obviously on the ground that the accused was labouring under a belief that his dream was a reality. The Bench came to the following conclusion:

> That the accused was clearly of unsound mind and that acting under delusion of his dream, he made this sacrifice believing it to be right.

We find ourselves unable to endorse this view of section 84 Indian Penal Code, and must, therefore, express our respectful disagreement with it. We are further of opinion that once this view is accepted to be correct, it will lead to serious consequences. It will be open to an accused in every case to plead that he had dreamt a dream enjoying him to do a criminal act and believing that his dream was a command by a higher authority, he was impelled to do the criminal act and he was, therefore, protected by section 84. We are of opinion that such a plea would be untenable, and would not fall within the

(1) A. I. R. 1949 Cal. 182

four corners of section 84, Indian Penal Code, which provides as follows

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law

The significant word in the above section is incapable The fallacy of the above view lies in the fact that it ignores that what section 84 lays down is not thet the accused claiming protection under it should not know an act to be right or wrong but that the accused should be incapable of knowing whether the act done by him is right or wrong The capacity to know a thing is quite different from what a person knows The former is a potentiality, the latter is the result of it If a person possesses the former, he cannot be protected in law, what ever might be the result of his potentiality In other words what is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality A person might believe so many things His beliefs can never protect him once it is found that he possessed the capacity to distinguish between right and wrong If his potentialities lead him to a wrong conclusion, he takes the risk and law will hold him responsible for the deed which emanated from him What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality Our beliefs are primarily the offsprings of the faculty of intuition On the other hand, the content of our knowledge and our realization of its nature is born out of the faculties of cognition and reason If cognition and reason are found to be still alive and gleaming, it will not avail a

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man to say that at the crucial moment he had been belogged by an overhanging cloud of intuition which had been casting its deep and dark shadows over them Legal insanity is not the same thing as medical insanity and a case that falls within the latter category need not necessarily fall within the former Further, the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity In the case cited the plea of the accused would belong to the former class whereas in the present case the plea of the accused would belong to the latter class The considerations that arise in the two cases might be different Mayne, quoting from the Draft Code of 1879, has stated the principle applicable to cases of delusions to be as follows

> A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which if it existed, would justify or excuse his act

The next case cited by learned counsel for the appellant is *Anandi* v *Emperor* (1) This case is easily distinguishable on facts from the present case This was a case in which a lady named Anandi had murdered a boy In this case there was in her favour the evidence of two experts, one of whom was Civil Surgeon and the other also was a doctor Both of them had found the accused subject to fits of insanity shortly after the murder There was also evidence of hereditary insanity in the family of the accused There was also evidence showing that her grandfather had at some time or other been insane Further, the facts indicated that the murder was committed without any motive The above case, therefore stands on a footing quite different from the present case In the present case, there is evidence of motive and, as already observed by us, the conduct of the appellant at the time of the incident as well as his antecedent and subsequent conduct both negative the plea of insanity under section 84 of the Indian Penal Code

(1) A.I.R. 1925 All 327

Further in the present case there is no evidence of any hereditary insanity There is also nothing to indicate that the accused was, at any time, overtaken by any fit of insanity after the crime Further there is no evidence of any expert in his favour Under the circumstances we fail to see how the above case helps the appellant

For the above reasons, we are of opinion that there is no substance in this appeal We, accordingly, dismiss this appeal and maintain the conviction and sentence of the appellant

Appeal dismissed

APPELLATE CIVIL

Before the Honourable O H Mootham, Chief Justice, and Mr Justice Dayal

1958
December
16

AMAR NATH SINGH (APPELLANT)

v

SUB DIVISIONAL OFFICER GYANPUR AND OTHERS (RESPONDENTS)

Panchayat Raj Elections—*Disqualification of candidates for—Jurisdiction of Election Tribunal to decide—United Provinces Panchayat Raj Act* 1947, *ss* 5 5A 5B 6 and 12—*Panchayat Raj Rules, rr* 14 18-C 24 *and* 25

The exclusive jurisdiction of the prescribed authority under s 5-A of the Panchayat Raj Act to decide questions of disqualification is meant for and must be confined to cases or occasions outside the province of an election petition and there is nothing in the Act or the Rules to exclude from the jurisdiction of the Election Tribunal the determination of that question when it arises in an election petition

The view of MEHROTRA, J in *Kashi Prasad* v *Dasrath*, (1) of CHATURVEDI, J in *Ram Kishan Singh* v *Ram Ras Singh* (2) and TANDON, J, in *Raghunandan Prasad* v *Sub Divisional Officer Hamirpur* (3) affirmed

(1) 1957 A. L. J. 108
(2) Civil Miscellaneous Writ no 276 of 1957 decided on 16th January 1957
(3) Civil Misc Writ no 2064 of 1956 decided on 29th January 1958

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AMAR NATH SINGH v SUB DIVISIONAL OFFICER, GHAZIPUR

Special Appeal no 424 of 1958 from a decision of Tandon J dated 19th March, 1958, in Civil Miscellaneous Writ no 2349 of 1956

The facts appear in the judgment

Y K S Chaudhary for the appellant

The Standing Counsel for the respondents

The judgment of the Court was delivered by—

MOOTHAM C J —This is an appeal against the order of Mr Justice TANDON, dated the 19th March 1958

The appellant and the second respondent were candidates for election to the office of Pradhan of a Gaon Sabha The nomination paper of the second respondent was rejected by the Returning Officer on the ground that the taxes due by him to the Gaon Sabha were in arrears and he was therefore disqualified under clause (*e*) of section 5 A of the U P Panchayat Raj Act 1947 The appellant was accordingly declared to be duly elected The second respondent then filed a petition under section 12 C of the Act in which he called in question the election of the appellant on the ground that his, that is, the second respondent s, nomination paper had been improperly rejected and that the result of the election had been materially affected thereby The election petition was allowed and by an order, dated the 13th June, 1956, the Sub Divisional Officer set aside the election of the appellant and declared a casual vacancy The appellant then filed a petition in the Court under Article 226 of the Constitution in which he challenged the validity of that order on the ground, *inter alia*, that the Sub Divisional Officer had no jurisdiction to decide the question of disqualification which ought, it was contended to have been referred by him to the prescribed authority under section 6 A of the Act That petition was dismissed by the learned Judge and the appellant now appeals

The only question argued before us is with regard to the jurisdiction of the Sub Divisional Officer to decide the question of disqualification

Section 6 A of the Act provides that—

> If any question arises as to whether a person has become subject to any disqualification mentioned in sections 5, 5 A or 5 B or in sub section (1) of section 6 the question shall be referred to the prescribed authority for the decision and his decision shall subject to the result of any appeal as may be prescribed be final and the name of the person shall if necessary be struck off from the register of members.

Section 5 deals with membership of a Gaon Sabha and section 5 A specifies the disqualifications for holding office under a Gaon Sabha or Nyaya Panchayat. Section 5 B provides that a member of a Gaon Sabha shall not be qualified to be chosen as Pradhan unless he is not less than 30 years of age and sub section (1) of section 6 states the circumstances in which a member of a Gaon Sabha shall cease to be a member.

Now the second respondent's election petition was filed under section 12 C, which provides that the election of a person as Pradhan of a Gaon Sabha shall not be called in question except by an application presented to such authority, within such time and in such manner as may be prescribed on one or more of the grounds therein stated. These grounds include the allegation that the result of the election has been materially affected by the improper rejection of any nomination, and it is, therefore, clear that the Tribunal which is the Sub Divisional Officer has ultimately to decide this issue. It is, however, contended that the Sub Divisional Officer is obliged, in view of the provisions of section 6 A, to refer that question to the authority prescribed under that section. We are of opinion that this argument is not well founded. The question has come before this Court on three previous occasions. In *Kashi Prasad* v. *Dasrath* (1) MEHROTRA, J., held that, notwithstanding the provisions of section 6 A it was within the competence of the Sub Divisional Officer, when dealing with an election petition, to investigate the question whether a candidate's nomination had been wrongly accepted or not. The same

(1) 1957 A. L. J. 108

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view was taken in *Ram Kishan Singh* v. *Ram Rai Singh* (1) by Mr Justice CHATURVEDI, who was of opinion that the operation of section 6 A should be confined to cases where the question of disqualification arises otherwise than in election proceedings The question was also considered by Mr Justice TANDON in *Raghunandan Prasa* v *The Sub Divisional Officer, Hamirpur* (2) the learned Judge being of the view that section 6 A applies only to those cases where the disqualification arises after the election

Section 6 A is couched in wide terms and is not easy to interpret but we are satisfied that it cannot be given the meaning attributed to it by the appellant The argument in short is that its provisions are mandatory and that in every case in which a question arises as to whether a person has become subject to any of the disqualifications mentioned in sections 5, 5 A, 5 B or 6 (1), the question must be referred to the prescribed authority which under rule 14 of the U P Panchayat Raj Rules is the Tehsildar The section if so construed, would, however, then be in conflict with the provision of rule 18 C which confers upon a Returning Officer the power to scrutinize the nominations and to reject a nomination on the grounds, *inter alia*, that the candidate is not qualified or that he is disqualified under section 5 A It would also be in conflict with proviso (1) to rule 24, which empowers a *Sub Divisional Officer summarily to reject an election petition*, if he is of opinion that it has no substance

Moreover, rule 14 provides that an appeal shall lie to the Sub-Divisional Officer from an order made by a Tehsildar on a question referred to him under section 6 A, and it would accordingly follow, if the appellant s argument be correct, that if at the hearing of an election petition the ground is taken that a nomination has been improperly accepted or rejected the Sub Divisional Officer must refer the question to a subordinate officer, namely, the Tehsildar, thereafter decide the appeal, (if any), from the Tehsildar s order, and finally determine

(1) Civil Miscellaneous Writ no 276 of 1957 decided on 16th January 1957
(2) Civil Miscellaneous Writ no 2064 of 1956 decided on the 29th January 1958

the issue in accordance either with the Tehsildar's opinion or his own opinion on appeal if one has been lodged We think it impossible to hold that such was the legislature's intention

Sub section (4) of section 12 C provides that the authority—that is, the Sub-Divisional Officer—before whom the election petition is filed under sub-section (1), shall, as regards the hearing of the petition and the procedure to be followed at such hearing have such powers and authority as may be prescribed Those powers are to be found in rule 25 which provides *inter alia*, that an election petition shall be tried as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits No provision is made in this rule, or in any other rule in Chapter I F relating to election petitions, for the reference of an issue as to disqualification to the prescribed authority under section 6 A We are accordingly of opinion that the powers of the Sub Divisional Officer hearing an election petition and the procedure which he shall follow thereat are to be found in section 12 C of the Act and Chapter I F of the Rules and that the provisions of section 6 A have no application to such matters

We accordingly are of opinion that the decision of the learned Judge was right and that this appeal must fail It is accordingly dismissed

Appeal dismissed

CIVIL MISCELLANEOUS

Before the Honourable O H Mootham, Chief Justice, and Mr Justice Dayal

TRILOK CHAND (PETITIONER)

v

THE ELECTION TRIBUNAL, MEERUT AND ANOTHER (OPPOSITE PARTIES)

1958

December 24

Municipal Election—*Votes polled by candidates for membership rendered equal by the finding of the Election Tribunal —Power of the Tribunal to draw and decide by lot—United Provinces Municipalities Act 1916 ss 24 (1) and 25—United Provinces Municipalities (Conduct of Election of Members) Order, 1953 r 67*

In matters relating to the declaration of a duly elected candidate the jurisdiction of the Election Tribunal under the Municipalities Act is co-extensive with that of the Returning Officer and therefore where the number of votes polled by rival candidates for membership of the Board are rendered equal by the finding of the Tribunal it is competent for the Tribunal itself to draw lots and declare the candidate duly elected as a result of the same

Hari Vishnu Kamath v *Ahmad Ishaque* (1) *Mani Ram* v *Bhagwat Sarup* (2) relied on

Civil Miscellaneous Writ no 1950 of 1958

The facts appear in the judgment

S N Kachar for the appellant

S C Khare for opposite party no 2 and Standing Counsel for the State

The Judgment of the Court was delivered by—

DAYAL, J —This is a petition under Article 226 of the Constitution

Trilok Chand, the petitioner, and Shanti Prasad, respondent no 2, were candidates for election to a seat in Ward no 2 of the Municipal Board, Hapur Shanti Prasad was declared elected as he secured 730 votes as against 729 secured by the petitioner

(1) A I R 1955 S C R 1104 (2) 1914 A L J 40

The petitioner then filed an election petition challenging the election of Shanti Prasad The Election Tribunal came to the conclusion that one vote cast in the name of Ram Chandra was wrongly and improperly admitted and that, therefore, each of the two candidates actually secured an equal number of votes namely, 729 The Election Tribunal further came to the conclusion that it had power in such circumstances to decide the issue by lot and to declare that candidate elected in whose favour the lot was drawn A lot was drawn accordingly and it was in favour of Shanti Prasad The Tribunal, therefore, declared Shanti Prasad duly elected It is this order, which Trilok Chand, the petitioner desires to be quashed

The main contention of the petitioner is that the Election Tribunal had no jurisdiction to determine the result of the election by drawing lots and that it ought in the circumstances to have directed lots to be drawn by the Returning Officer

The powers of an Election Tribunal are to be found in section 24 of the Municipalities Act which, so far as is relevant provides that—

> 24 (1) Unless it is otherwise provided by rule made in this behalf the Election Tribunal shall have the same powers and privileges as a judge of a civil court
>
> (2)

Section 25 of the Act is

> 25 (1) If the Election Tribunal after making such enquiry as it deems necessary finds in respect of any person whose election is called in question by a petition that his election was valid, it shall dismiss the petition as against such person and may award costs at its discretion
>
> (2) If the Election Tribunal finds that the election of any person was invalid, or that the nomination paper of the petitioner was improperly rejected it shall either—
>
> (a) declare a casual vacancy to have been created, or

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Dayal, J.

(b) decare another candidate to have been duly elected whichever course appears in the particular circumstances of the case the more appropriate and in either case may award costs at its discretion

The contention for the petitioner is that the Election Tribunal can pass such orders only as are contemplated by section 25 of the Act This need not be disputed This section provides for the final orders which the Election Tribunal has to pass as a result of its enquiry The question however is whether the Election Tribunal can hold on coming to the conclusion that each of the two candidates obtained the same number of votes at the election that the election of the candidate declared elected was valid or invalid If it cannot say so, it cannot pass any of the orders contemplated by section 25 on the mere finding that each candidate had secured an equal number of votes It cannot possibly say if the Returning Officer had found that each candidate had secured the same number of votes, what would have been the result of the Returning Officer s drawing a lot It follows therefore, that the enquiry which an Election Tribunal is expected to make is not complete at the stage of holding that the votes cast for both candidates are equal and the enquiry must proceed further to find which of the two candidates should be given an additional vote for the purpose of determining whether the election of the candidate declared elected was valid or not This it can do only by the drawing of lots and on the analogy of the provisions of rule 67 of the U P Municipalities (Conduct of Election of Members) Order 1955 by holding that the candidate on whom the lot falls had received an additional vote at the election

In *Hari Vishnu Kamath* v *Ahmad Ishaque* (1) the following observations are to be found at page 248

> Rule 47 (4) is important It provides that the decision of the Returning Officer as to the validity of a ballot paper shall be final subject to any decision to the contrary given by a Tribunal on the trial of an election petition calling in question

(1) A I R 1955 S C 233

the election Under this provision the Tribunal is constituted a Court of Appeal against the decision of the Returning Officer and as such its jurisdiction must be co extensive with that of the Returning Officer and cannot extend further

A provision similar to that of rule 47 (4) is to be found in rule 67 (4) of the U P Municipalities (Conduct of Election of Members) Order 1953 We hold therefore that the jurisdiction of the Election Tribunal in this case is co extensive with that of the Returning Officer and that it can do what the Returning Officer could have done if he had found that both candidates had secured the same number of votes It could therefore draw lots and add a vote to the votes of the candidate on whom the lot fell

This is exactly what has been held in *Mani Ram* v *Bhagwat Sarup* (1) In repelling the contention that when there is a tie then the Commissioner (the Election Tribunal) cannot have recourse to rule 50 of the Election Rules which authorized the Returning Officer to refer the matter when there is a tie to the District Magistrate MALIK, C J observed

> The Commissioner has been given the right to declare another candidate to have been duly elected and for that purpose he can do all that the law provides unless there is something in the section or the rule to prevent his doing so Section 25 (2) (*b*) does not debar the Commissioner from taking such initial steps as may be necessary to declare a candidate to have been duly elected A Commissioner is in a sense a court of appeal and as a court of appeal he would normally have the same powers as the trial court unless there is something in the Act or in the rules to take away that power

The observations in paragraph 7 of the Supreme Court judgment in *Jagan Nath* v *Jaswant Singh* (2) do not go against this view They are simply to the effect that the

(1) 1949 A L J 40 (2) A I R 1954 S C 210

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Dayal, J.

election contest is not an action at law or a suit in equity and that the statutory provisions of the election law must be strictly observed

It is urged for the petitioner that although rule 48 of the Uttar Pradesh Municipalities (Conduct of Elections of Presidents and Election Petitions) Order 1955 lays down what the Election Tribunal is to do if it finds during the trial of an election petition that there is an equality of votes and that the addition of a vote would entitle any of the candidates to be declared elected as President, there is no such provision when an Election Tribunal is dealing with the election petition of a member and that, therefore, the necessary conclusion is that the Election Tribunal determining the question of the election of a member of a Municipal Board has no such power We do not agree The absence of such a provision does not necessarily mean that the Election Tribunal does not have this power

We are, therefore, of opinion that the Election Tribunal had the power to draw lots when it came to the conclusion that the two rival candidates had secured an equal number of votes at the election

The other contention is that the Presiding Officer of the Election Tribunal did not himself draw the lots but had the lots drawn by his daughter aged four or five years and that, therefore, the drawing of the lots was illegal It may have been irregular but we cannot see in what way the petitioner can have been prejudiced thereby It appears to be immaterial which person picks out the balls or the pieces of paper which were used for the purpose of drawing the lots

For the reason stated above we see no force in this petition and dismiss it with costs

Petition dismissed

APPELLATE CIVIL

Before Mr Justice Dayal and Mr Justice James

SARWAT YAR KHAN (APPELLANT)

v

STATE OF UTTAR PRADESH AND ANOTHER (RESPONDENTS)

1959

January 6

Arbitration—*Application for reference to—Period of limitation for—Cause of action when accrues—Arbitration Act,* 1940 *s* 20—*Indian Limitation Act* 1908 *Art* 181

Where under the terms of a lease containing an arbitration clause the lessor has unquestionably the right to terminate the lease and enter into possession subject only to the right of the lessor to recover compensation the cause of action for the purposes of limitation to an application for reference to arbitration accrues not when the lease is terminated but when the parties come to an issue regarding the right to or amount of compensation

Queere whether an application under s 20 of the Arbitration Act for reference of a dispute is governed by Art 181 of the Limitation Act

The view in the affirmative taken in *L Amar Nath* v *The Union of India* (DESAI and BIG JJ) it was observed needs reconsideration by a larger Bench

Case law discussed

First Appeal From Order no 201 of 1955, from an order of Ambika Prasad Srivastava, (as he then was), District Judge of Kumaun dated the 18th April, 1955

The facts appear in the judgment

Mukhtar Ahmad, for the appellant

The Standing counsel for the respondents

The judgment of the Court was delivered by—

DAYAL, J —Sarwat Yar Khan filed an application under section 20 of the Indian Arbitration Act on the 16th of August 1954 before the District Judge of Kumaun alleging that on the 8th of May, 1949, the Deputy Commissioner, Naini Tal, abruptly cancelled the lease executed by the latter in favour of the appellant on the 7th of July, 1948, and took possession of the land along with the houses built by the appellant and the groves and other

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Dayal J

trees that stood on the land He also alleged that according to the terms of the lease he was entitled to compensation He represented to the respondents about his claim for compensation and when they paid no heed to his request he made the aforesaid application praying that the agreement of reference to arbitration contained in the lease deed be filed and a reference be made to the Board of Revenue for determining the amount of compensation to which the appellant was entitled

The opposite parties contested the application They accepted the allegations of the appellant and further stated that they had given 250 acres of land in village Ammaganj to the appellant in compensation for the land resumed and that the appellant had accepted that land They pleaded that a duly registered lease had been executed in favour of the appellant on the 10th of September 1951 and that, therefore there was no question of any dispute being referred to arbitration They further pleaded want of jurisdiction and limitation

The learned District Judge of Kumaun dismissed the application on the ground of limitation holding that it should have been filed within three years of the 8th of May 1949 when the right to apply accrued to the appellant on the cancellation of the lease and the arising of a dispute about compensation to which he was entitled He was of opinion that article 181 of the First Schedule of the Limitation Act applied to applications under section 20 of the Indian Arbitration Act

Sarwart Yar Khan thereupon filed a First Appeal From Order in this Court The learned Judge before whom the appeal was placed for hearing directed the matter to be referred to a Bench of two Judges in view of there being no direct authority on the question whether Article 181 of the Limitation Act applied to Arbitration Act or not It is thus that this First Appeal From Order has come before us

In the case of *L Amar Nath v The Union of India* (1), DESAI and BEG, JJ, held that Article 181 of the Limitation Act which is a residuary Article must be held

(1) 1957 A L J 18

to apply to applications not only under the Code of Civil Procedure but also under the Arbitration Act for which no provision was made elsewhere in the third division of the First Schedule of the Limitation Act and that therefore, an application under section 20 of the Arbitration Act must be made within three years of the date on which the right to make it accrues The Full Bench case of *Shiam Lal J Dewan* v *Official Liquidator of U P Oil Mills Co , Ltd* (1), observing—

> It has been held that in view of the fact that all preceding Articles apply to applications made under the Code of Civil Procedure Article 181 also applies to other applications under the same Code, i e , the application contemplated therein is *ejusdem generis* with the other applications which are specially specified In this view of the matter even Article 181 would not have applied and of course, none of the other special Articles would have been applicable

was not followed as subsequent to the enactment of the Arbitration Act in 1940, two Articles, namely, 158 and 178, had been added in the third division of the First Schedule—the Articles relating to applications made under the Arbitration Act, 1940 Support to the view was obtained from the cases of *Union of India* v *Firm Kiroo Mal Nawal Kishore* (2) and *Shah & Co* v *Ishar Singh Kirpal Singh & Co* (3) The rationale of this decision loses much of its force in view of the observations of their Lordships of the Supreme Court in *Sha Mulchand & Co , Ltd* v *Jawahar Mills Limited, Salem* (4) the case which does not appear to have been brought to the notice of the learned Judges It is observed at page 104

> It does not appear to us quite convincing without further argument, that the mere amendment of Articles 158 and 178 can *ipso facto* alter the meaning which as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in Article 181

(1) A I R 1933 All 789
(2) A I R. 1952 Punj 423
(3) A I R 1954 Ca 164
(4) A I R 1953 S C 98

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Dayal, J.

This long catena of decisions may well be said to have as it were, added the words under the Code in the first column of that Article If those words had actually been used in that column, then a subsequent amendment of Articles 158 and 178 certainly would not have affected the meaning of that Article If however as a result of judicial construction those words have come to be read into the first column as if those words actually occurred therein we are not of opinion as at present advised that the subsequent amendment of Articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of Article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available

We are, however, of opinion that it is not essential for the decision of this appeal to decide whether Article 181 of the First Schedule of the Limitation Act applies to applications under section 20 of the Arbitration Act Suffice it to say that if it had been necessary to decide this point, we would have referred this question for decision to a larger Bench, as we are of opinion that the view expressed in the cases of *L Amar Nath* v *The Union of India* (1) requires reconsideration both in view of the observations of the Supreme Court and the past history of the non application of the Limitation Act to such applications, which are now covered by section 20 of the Arbitration Act

It is clear from the aforesaid narration of facts that the dispute between the parties is about the compensation to be paid A dispute about compensation did not automatically come into existence on the 8th of May, 1949, when the lease was cancelled and possession over certain land and buildings taken by the respondents The appellant claimed compensation and it appears according to the case of the respondents, that the negotiations about compensation concluded on the 10th of September, 1951, when a registered lease was executed

(1) 1957 A L J 18

in favour of the appellant with respect to certain land given to him in exchange for the land resumed It is alleged that the appellant agreed to accept this land in exchange In the circumstances the real dispute about compensation accrued on or after the 10th of September 1951 Any cause of action for filing an application under section 20 of the Arbitration Act would arise on or after the 10th of September 1951 Even if Article 181 of the First Schedule of the Limitation Act applies to such an application, the application presented on the 16th August 1954 was within three years of the accrual of such a cause of action

It is contended for the respondents on the basis of sub clause (6) of clause 2 and of clause 3 of the original lease that the right to apply for arbitration accrued at dispossession on the 8th of May, 1949, and not on the 10th of September 1951 when a fresh lease with respect to some other land was executed in favour of the appellant Sub clause (6) of clause 2 is in these terms

> If during the term of this lease, the Government of the United Provinces require the demised land or any part thereof for any purpose the lessor may determine the whole or part of the lease and may take possession of such land or part as the case may be but in such case the lessee shall be entitled to such compensation as he would obtain were he dispossessed under the law for the time being in force for compulsory acquisition of land by Government under the provisions of the Land Acquisition Act, 1894

Clause 3 is

> The parties hereto agree that every dispute, difference or question which may at any time arise between them or any person claiming under them, touching or arising out or in respect of this lease or the subject matter thereof, whether during its continuance or after its determination from any cause whatsoever shall be referred to the arbitration of the Board of Revenue, United Provinces, and his decision shall be final and binding on the parties '

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Dayal J

The respondents had the right to dispossess the appellant The appellant does not dispute that right of the respondents The respondents in their turn do not dispute the right of the appellant to compensation They in fact according to their case granted him a fresh lease to compensate him for the rights he had got under the original lease The dispute about the quantum of compensation actually arose when the negotiations failed or succeeded only partially on the 10th of September 1951 It is a dispute arising between the parties in respect of the lease or its subject matter which is to be referred to arbitration The question of dispossession or the determination of the compensation was not to be referred unless the parties were at a dispute whether the appellant could be dispossessed or whether the appellant was entitled to compensation or as to what amount of compensation he was entitled to The parties really came to differ on the 10th of September, 1951 when they did not agree on the adjustment of the claim of compensation by the mere grant of a fresh lease We are, therefore, of opinion that this contention for the respondents is not correct and the right to apply for referring the matter to arbitration arose on the 10th of September, 1951 and that, therefore this application under section 20 of the Arbitration Act was filed in time

We are, therefore of opinion that the application under section 20 of the Arbitration Act was filed within limitation

It is further contended for the appellant that the pleader s fee taxed in the decree of the court below at Rs 1,662 8 should be Rs 750 in view of clause (5) of rule 24, Chapter XXI, General Rules, (Civil), corrected up to the 31st March, 1954, as amended by correction slip, dated the 28th April, 1944, whereby the figure of Rs 750 was substituted for the figure Rs 500 in this clause The contention is correct and the learned counsel for the respondents has nothing to say against it

We, therefore, allow the appeal with costs, set aside the order of the court below and send the case back to it for further proceedings according to law We further

direct that the decree prepared by the court below be corrected with respect to the amount taxed for the defendants pleader s fee the figure 750 be substituted for the figure 1662 8 0 and the figure 752 be substituted for the figure 1664 8 0 in the total of the costs shown as incurred by the defendants and also for the same figure shown in the operative portion of the decree

CIVIL MISCELLANEOUS

Before the Honourable O H Mootham, Chief Justice, and Mr Justice Dayal

HORI LAL AND ANOTHER (APPLICANTS)

v

BOARD OF REVENUE, U P, AND OTHERS (OPPOSITE PARTIES)

1959

April 30

Supreme Court Appeals—*Consolidation of for purposes of pecuniary valuation—Requisites of—Code of Civil Procedure* 1908 *Or XLV, r 4—Constitution of India* 1950 *Art* 133 (1) (a)

Of the six writ petitions arising out of six different suits on the basis of six different leases given to different persons one was dismissed on the 6th October 1958 and the rest were dismissed on the 7th October 1958 by a short order in each case This petition is concluded by our order dated the 6th October in Civil Misc Writ no 2664 of 1958 We therefore reject it

On an application for the consolidation of these cases for the purposes of pecuniary valuation in appeal to the Supreme Court under Art. 133 (1) (a) of the Constitution—

Held that the cases cannot be said to have been decided by the same judgment and were therefore, incapable of consolidation

In suits involving substantially the same question for determination Or XLV r 4 of the Code of Civil Procedure permits consolidation if they are decided by the same judgment' and forbids consolidation if they are decided by separate judgments and if each such separate judgment even though identical in terms be treated as the same judgment, there would be little left of the diversity envisaged in the two portions of the rule

Bhagwan Singh v *Bhawani Das*(1) held obscure and therefore no authority on the point.

Case law discussed

(1) A I R 1921 All 220

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HORI LAL
v
BOARD OF REVENUE, UTTAR PRADESH

Misc Application under order XLV, rule 4 of the Civil Procedure Code in Supreme Court Appeal no 257 of 1958

The facts appear in the judgment

S C Khare for the applicants

The Standing Counsel for the opposite Parties

DAYAL, J —This is an application under Order XLV, rule 4 of the Civil Procedure Code in Supreme Court Appeal no 257 of 1958

The facts leading to this application are as follows One Oudh Behari Singh was a tenant of several plots of land in village Luhiyapur, tahsil Auraiya district Etawah He surrendered his tenancy rights in favour of the zamindar, Bishambhar Singh, in 1947 The zamindar then leased out the plots to different persons under written leases Certain other persons laid claim to the tenancy rights in such land The result was that the different lessees who constituted thirteen sets instituted thirteen suits against the persons claiming tenancy rights in the plots of land leased out to the respective sets of plaintiffs The trial court decreed the suits The decrees were maintained on appeal by the defendants The defendants then filed second appeals before the Board of Revenue The Board of Revenue held that these thirteen appeals had abated on account of the legal representatives of Bishambhar Singh not being brought on the record The defendants of eight suits filed writ petitions in this Court against the orders of the Board of Revenue This Court allowed those petitions and quashed the orders of the Board of Revenue that the second appeals had abated On the rehearing of the second appeals the Board of Revenue allowed six of them holding the defendants appellants in those second appeals to have acquired the right of *adhivasi* on the basis of their being recorded occupants in the village papers of 1356 F The plaintiffs of these six suits then filed six writ petitions in this Court They were numbered Civil Misc Writ petitions nos 2663, 2664 2665, 2666, 2667 and 2668 of 1958

This Court dismissed Civil Misc Writ no 2664 of 1958 on the 6th of October 1958 The other five writ petitions were dismissed on the 7th of October 1958 by the short order This petition is concluded by our order dated the 6th October last in Civil Misc Writ no 2664 of 1958 We, therefore reject it

The petitioners of the six petitions have filed Supreme Court Appeals nos 257 258, 259 260 261 and 262 of 1958 for leave to appeal to the Supreme Court under Article 133 (1) of the Constitution Supreme Court Appeal no 257 of 1958 is by Hori Lal and Ganga Ram the petitioners in Civil Misc Writ no 2668 of 1958 Paragraph 25 of each of these Supreme Court Appeals is identical except for the omission of the number of the writ petition relating to that particular Supreme Court Appeal Paragraph 25 of the Supreme Court Appeal no 257 of 1958 is

> That there were six connected writ petitions nos 2663 2664 2665 2666 and 2667 of 1958, arising out of the connected suits in which applications for leave to appeal to the Supreme Court are being filed and they together involve the properties in dispute of value more than Rs 20 000 and are thus entitled to a certificate of being fit for leave to appeal to the Supreme Court of India on that ground

It is conceded for these applicants for leave to appeal to the Supreme Court that the value of the subject matter of each writ petition was less than Rs 20 000 and that therefore, none of the applicants is entitled to a certificate under Article 133 (1) (a) or (b) of the Constitution What is contended on their behalf is that they are entitled to this certificate if for pecuniary purposes the writ petitions are consolidated, in which case the valuation of the subject matter involved in the six appeals will exceed Rs 20,000 The present application under Order XLV rule 4 of the Civil Procedure Code is for the consolidation of the six Supreme Court Appeals for the purposes of pecuniary valuation The application is opposed both on the ground that the consolidation is not possible under Order XLV, rule 4,

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Civil Procedure Code, and on the ground that even on consolidation the value of the subject matter of the six writ petitions will not exceed Rs 20,000 We have not heard the learned counsel for the parties on the question of actual valuation in case the writ petitions are consolidated, as we are of opinion that the contention for the respondents is correct and these petitions cannot be consolidated

Rule 4 Order XLV of the Civil Procedure Code reads thus

> For the purposes of pecuniary valuation suits involving substantially the same questions for determination and decided by the same judgment may be consolidated but suits decided by separate judgments shall not be consolidated notwithstanding that they involve substantially the same question for determination '

The six writ petitions were not decided by the same judgment Writ Petition no 2664 of 1958 was decided on the 6th of October, 1958 That judgment did not decide any other writ petition The other five writ petitions were decided by five separate orders though identical in term in view of the decision in Writ Petition no 2664 of 1958 as the points of law urged for praying the quashing of the orders of the Board of Revenue were common It is not possible therefore, to hold that the six writ petitions were decided by the same judgment and it follows that these writ petitions cannot be ordered to be consolidated under Order XLV, rule 4, Civil Procedure Code

It is contended for the applicants that the writ petitions can be said to be decided by the same judgment, as the judgments in the other five writ petitions adopted the judgment in Writ Petition no 2664 of 1958 This too is not a correct version The judgment in Writ Petition no 2664 of 1958 was not adopted in the other writ petitions The judgments in the other writ petitions followed what had been laid down in the earlier judgment in Writ petition no 2664 of 1958 This is done every day Previous rulings are relied upon for

deciding subsequent cases It cannot, strictly speaking, be said that the later cases have been decided by the judgments in the previous cases The latter part of rule 4 Order XLV, Civil Procedure Code, will become useless if such an interpretation be given Suits decided by separate judgments are not to be consolidated notwithstanding that they involve substantially the same question for determination Presumably such separate judgments must follow a similar line of reasoning Yet they are not treated as same judgment The word same means one identical The appropriate meaning of the word same in rule 4 seems to be one The word separate means distinct

In *Bhagwan Singh* v *Bhawani Das* (1) the Court considered the question of granting leave to appeal to His Majesty in Council against its order in an appeal arising out of a suit valued below Rs 10,000 There was another suit between the same parties The question for determination in both the suits was the same and the decision by the High Court in the appeal arising out of the suit valued below Rs 10,000 was given after considering at the request of the parties evidence in both the suits An objection was taken that no permission to appeal should be given because there was no question of law involved and the value was below Rs 10,000 and that Order XLV rule 4 Civil Procedure Code, was not applicable The contention was repelled and the following observation was made

> An appeal is after all a proceeding in continuation of a suit The value of the two suits in the court of first instance as also of the proposed appeal to the Privy Council is above Rs 10 000 and this Court has reversed the decree of the court of first instance The points raised in the two cases are identical, and we think that this is a proper case to which the procedure sanctioned by Order 45, rule 4 should be applied and the parties given an opportunity of having one decision from the highest Court of Appeal We, therefore, certify that this

(1) A I R 1921 All 276

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case fulfils the requirements of section 110 C P C, read with Order 45 rule 4, as regards the nature and value of the subject matter of the suit

There was no discussion as to how the case came within the provisions of Order XLV, rule 4 It does not appear from the reported judgment whether the two suits had been decided by this Court by one judgment or by two judgments This case therefore cannot be taken to be an authority against the view expressed by me

In *Pethu Reddiar* v *Rajambu Ammal* (1) objection was taken before the Privy Council to the certificate granted by the High Court to three persons to appeal to His Majesty in Council The suit out of which those appeals arose was instituted against 18 defendants and was for the setting aside of a power of attorney and 14 sale deeds The trial court cancelled three sale deeds and the High Court on appeal cancelled the others Only three of the vendees desired to appeal to the Privy Council and obtained the necessary certificate from the High Court In dealing with the objection to the propriety of the certificate granted by the High Court, their Lordships of the Judicial Committee said at p 98

> This was not the case of an appeal involving several appellants each of whom sued or was sued in respect of some distinct or unrelated cause of action, and it is unnecessary to consider the applicability of section 110 to appeals of that kind Here the case of the respondent against each appellant and of each appellant against the respondent depended, in its substance on the view taken of the evidence as a whole and turned on the same issue regarding the capacity of Somasundara On the facts of this appeal there was indeed but one matter in dispute unless the mere circumstance of a plurality of appellants decrees otherwise On the true construction of the section their Lordships

(1) A I R 1940 P C 97

were unable to see any ground for such a refinement and they therefore, overruled the preliminary objection

The writ petitions before us involved different petitioners different respondents different land different leases granted in favour of the petitioners and different entries in the village papers in favour of the different respondents The cause of action in each suit was different The Privy Council did not decide that cases like the present writ petitions could not be consolidated, but the observations of their Lordships of the Judicial Committee make it clear that such cases are of a different kind from the cases which could be consolidated

The cases relied on for the applicants are *Jivangiri Guru Chamelgiri* v *Gajanan Narayan Pathar* (1), *Vasi Reddi Srichandra Mauuleswara Prasada Bahadur Zamindar Guru* v *Secretary of State* (2) *Molugu Lakshmanarasimhacharyulu* v *Marisetti Ratnam* (3) and *Kishanlal Nandilal* v *Vithal Nagayya* (4)

In *Jivangiri Guru Chamelgiri* v *Gajanan Narayan Pathar* (1) the admissibility of a document giving an option of repurchase was decided against the plaintiff who had brought two suits, one on the basis of the document executed in his own favour and the other on the basis of his being an heir of the person in whose favour a similar document had been executed The trial court dismissed one suit on the ground that the document was inadmissible and the other suit on the ground that the plaintiff had failed to prove his heirship On appeal the High Court held both the documents to be inadmissible and did not decide the question of heirship in one of the suits The applications for leave to appeal to the Privy Council were consolidated as the evidence in both the suits was taken in one suit and the parties agreed to treat that evidence as evidence in the other suit as well The trial court referred to its findings in one suit in its judgment in the other suit The question of heirship was

(1) A I R 1927 Bom 19
(2) A I R 1932 Mad. 125
(3) A I R 1949 Mad 739
(4) A I R 1956 Nag 276

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not to be agitated before the Privy Council It was held in these circumstances that the suits had been decided by the same judgment within the meaning of rule 4, Order XLV, Civil Procedure Code and it was observed at p 20

> So far as the question that will arise in the proposed appeal is concerned, it is quite clear that it was dealt with by each court in one judgment and that the judgment in the other suit and the corresponding appeal, merely refers to that other judgment and, adopting the reasons there given passes a decree accordingly

It may be mentioned that the question in dispute was considered to be of general importance and the case a fit one for appeal to His Majesty in Council It is to be noticed that the point in dispute between the parties was decided by one judgment and was not separately decided in the different appeals In the case before us one judgment delivered a day earlier was used as an authority for deciding the same legal question in the same way and thus for disposing of the appeal in the same manner In these circumstances it cannot be said that the later appeals were decided by the same judgment by which we decided the first appeal If it could be possible to say so in the case of appeals decided at different times on the authority of an earlier decision consolidation would be logically possible under rule 4, Order XLV, Civil Procedure Code, though on the face of it it would appear odd

In the two Madras cases referred to above the High Court had decided several appeals by the same judgment and ordered the consolidation of the suits for purposes of valuation under rule 4, Order 45, Civil Procedure Code In tha earlier Madras case the High Court observed at p 126

> In a matter of this kind we think we should look to the spirit of the rule and not the letter That it the view taken by the learned Judges of the Bombay High Court in *Jivungeri v Gajanan Narayan* (1) I

(1) A I R 1927 Bom 19

think that the judgments of the lower court must be regarded as the same judgment and, therefore, the objection of the learned Government Pleader is disallowed We are prepared to consolidate the value of the suits if it is of any use to the petitioner

With respect we are of opinion that the identity of two separate judgments will not make them one and the same

In the later Madras case (1) the High Court decided various Letters Patent Appeals by a common judgment In fact there was a common judgment in the second appeals and in the first appeals to the Subordinate Judge s court In the trial court the suits were tried together and evidence was adduced only in one of the suits as evidence common to all the suits The trial court delivered the judgment in the suit in which evidence was recorded and incorporated relevant extracts of the findings from that judgment in the judgments of the other suits In these circumstances it was observed

In substance, however, it must be considered that the suits were all decided by the same judgment , and the observations in the former Madras case (2) were approved

In *Kishanlal Nandilal* v *Vithal Nagayya* (3) four petitions under Article 133 of the Constitution read with sections 109 and 110, Civil Procedure Code, for leave to appeal to the Supreme Court were consolidated The four appeals had been decided by four different judgments It was observed during the course of the judgment

> Though cases are to be found in the commentaries supporting the opposite contention, the trend of opinion now seems to be that if the judgments are substantially the same consolidation can be ordered

No reference to any decided case has been made in this connection The only cases which have been referred to us being relevant to the question under determination are the three cases just now dealt with

(1) A I R 1949 Mad 739 (2) A I R 1932 Mad 125
(3) A I R 1956 Nag 276

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It was further observed

> In our opinion this latter trend is in consonance with the grammatical meaning of the rule The definition of the word judgment in sub section (9) of section 2 of the Code of Civil Procedure was substituted in rule 4, Order XLV Civil Procedure Code, and the same judgment was taken to mean same statement given by the Judge of the grounds of a decree or order It was then observed
>
> > When a Judge writes a single statement of the grounds and makes those grounds applicable to different decrees, it is, in our opinion, the same judgment for the purposes of R 4 of O 45 of the Code
>
> Even according to this interpretation only those separate judgments would be deemed to be the same judgment when the reasons for the decision are mentioned in one judgment and the other judgments refer to those reasons and thereby make those reasons part of themselves This interpretation will not apply to those judgments of the High Court where the judgment delivered in one case is taken as an authority for deciding the other case—of course when the points for determination are just questions of law I may say with respect, that the definition of the word judgment in sub section (9) of section 2 is to be applied for interpreting that word in the Code when there be nothing repugnant in the subject or context and it appears to us that to call separate judgments delivered at different times as the same judgment —if the rationale of one decision is the same as of the other—does not appear to be consonant with the provisions of the two portions of rule 4, Order 45 Civil Procedure Code If separate Judgments dealing with substantially the same questions will have to be considered as the same judgment' there will be little left of distinction in the two portions of this rule

For the reasons stated above I am of opinion that these six writ petitions, arising out of six different suits on the basis of six different leases given to different person and rival claims by six different sets of persons with respect

to different holdings decided by six different judgments, cannot be said to have been decided by the same judgment and cannot, therefore, be consolidated for the purposes of valuation under rule 4 Order 45 Civil Procedure Code I would therefore reject this application

MOOTHAM, C J —I have had the advantage of reading the judgment prepared by my brother and agree substantially for the reasons stated by him that this application must be dismissed I should have been prepared to give a liberal construction to the provisions of Order XLV rule 4 were it not for the concluding words of that rule— but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same question for determination The use of these words seems to me to show that it was the intention of the legislature in enacting rule 4 that only those suits which are decided by the same, that is by one judgment should be capable of consolidation

By the Court—The application is rejected

Application rejected

APPELLATE CRIMINAL

*Before Mr Justice Mulla and Mr Justice Misra**

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v
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July 24

Criminal Trial—*Murder—Husband killing the deceased—Intimacy with the wife—Grave and sudden provocation—Onus—Discharge—Indian Evidence Act,* 1872 *s* 105 *scope of—Indian Penal Code,* 1860 *ss* 300 *Explanation I,* 302 *and* 304 *scope of*

It was proved that Ram Nath deceased was killed by the accused appellant at the hut in the Government House orchard at 4 30 p m on 11th January 1958 and it was contended that the appellant committed this crime when he had completely lost his self control and his case fell under s 304 Indian Penal Code and not s 302

*Sitting at Lucknow

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The prosecution alleged that the deceased had come to the wife of the appellant in his absence even though the deceased had suspected on earlier occasions that he carried on an illicit intimacy with his wife and had gone even to the extent of drawing the attention of the community Panchayat to this fact The appellant was also uttering words that he was causing injuries to the deceased because in his opinion the victim was having an intrigue with his wife

Held that where it becomes apparent from the evidence led in the case whether produced by the prosecution or the defence that an Exception would be applicable the presumption against the accused is removed and the onus placed upon him is discharged and the court must consider whether the case of the accused is covered by the Exception or not irrespective of the stand taken or the plea advanced by him Where on consideration of the entire evidence the court is left in doubt the benefit of the Exception cannot be denied to the accused

Held, further that where the prosecution case itself indicates that an Exception is applicable in favour of the accused the accused cannot be denied the benefit of that Exception whether he pleads it or not

Mangal Gande v *Emperor* (1) *Kali Churn Mookerjee* in the matter of (2) *Emperor* v *Wajid Husain* (3) *Kuti* v *Emperor* (4) relied on *Queen Empress* v *Timmal* (5) distinguished

Where the husband is living in a fool's paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and this intimacy was continued all the time this would amount to a sudden knowledge which would come as a shock to him and the circumstances established in this case proved that the accused when he killed the deceased had lost his self-control because of a grave and sudden provocation and his conduct is protected by Exception I to section 300 Indian Penal Code and his offence falls under Section 304 Indian Penal Code and he can be convicted only under this Section

Criminal Appeal no 541 of 1958 from an order of B N Chaudhri Sessions Judge, Lucknow dated 23rd August, 1958

The facts appear in the judgment

Hakimuddin Siddique for the appellant

Badruzzaman, holding brief for the Additional

(1) A I R 1925 Nag 37
(2) (1882) 11 Cal L R 232
(3) (1910) I L R 32 All 451
(4) A I R 1930 Cal 442
(5) (1899) I L R 21 All 122

Government Advocate, for the State

The judgment of the Court was delivered by—

MULLA, J.—Babu Lal appellant has been convicted under section 302 Indian Penal Code, and sentenced to imprisonment for life by the Session Judge Lucknow The charge against the appellant was that on the 11th of January 1958 at about 4 30 p m he along with his servant Lalta struck the deceased Ramnath with a scythe with the intention of killing him and thus committed an offence under section 302, 34 Indian Penal Code The trial court did not frame the charge properly for in every case where section 34, Indian Penal Code is applied the court should clearly mention that the crime was committed in furtherance of a common intention This fact was not mentioned in the charge framed by the trial court The trial court acquitted Lalta and gave him the benefit of doubt and convicted the appellant under section 302 Indian Penal Code, simpliciter

As we are criticising the trial court, we may at this very stage observe that we have not been impressed by the reasoning of the trial court when it completely acquitted Lalta the other accused The reasoning adopted by the trial court cannot bear scrutiny and good evidence has been ignored on fanciful grounds The medical evidence alone is conclusive on the point that two persons at least committed this crime and yet the trial court by fallacious reasoning came to the conclusion that the bruises and the abrasions on the person of the deceased could have been caused in grappling alone We fail to understand how a large dimension on the face could have been caused by friction alone It is inconceivable that one assailant used a blunt weapon and then put it down and picked up a sharp edged weapon We, therefore, have no doubt in our minds that the convincing evidence of two eye witnesses together with the medical evidence was ignored by the trial court and on faulty reasoning it gave the benefit of doubt to Lalta accused This however, in our opinion has not caused a grave miscarriage of justice because we are inclined to the view that Lalta did not share the intention of the appellant and he could have been held responsible only

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Before us the counsel for the appellant has not contended that the appellant was not responsible for the death of Ramnath deceased As a matter of fact, it was not possible to advance this contention We however, need not mention those facts which conclusively establish that Ramnath deceased was killed at the hut in the Government House orchard at 4 30 p m on the 11th of January, 1958 There is overwhelming evidence to prove this fact but as the counsel for the appellant has not challenged the findings of fact reached by the trial court it is not necessary to mention those facts He has advanced only one contention before us, namely, that the appellant committed this crime when he had completely lost his self control and, therefore, his case falls under section 304 Indian Penal Code, and not section 302, Indian Penal Code

In deciding the question of law placed before us there are two subsidiary questions which should be decided first, These subsidiary questions are

(1) Can the benefit of an exception be given to an accused person although he does not plead it?

(2) Do the facts proved in the case establish that the appellant received a grave and sudden provocation when he committed this crime?

We will deal with the first question now No case law was placed before us either by the counsel for the appellant or by the counsel for the State We are, therefore deciding this question on our own interpretation of the law and some decisions on which we could place our hands In our opinion the onus of establishing an exception shifts to the accused when he pleads an exception Section 105 of the Indian Evidence Act is clear on that point We have now to see how this onus can be discharged by the appellant and to what extent this onus is placed upon him In our opinion this onus can be discharged in two ways In the first place, it can be discharged by affirmatively establishing the plea taken up by an accused person In the second place it can also be discharged by eliciting such circumstances which would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated

This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself If it becomes apparent from the evidence led in the case whether produced by the prosecution or the defence that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged and the court must consider whether the case of the accused is covered by the exception or not, irrespective of the stand taken or the plea advanced by him Where on consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused In this case the prosecution itself came forward with the story that the deceased had come to the wife of the appellant in his absence even though the deceased had suspected on earlier occasions that he carried on an illicit intimacy with his wife and had gone even to the extent of drawing the attention of the community Panchayat to this fact It was further a part of the prosecution case that even at the time when the appellant was committing this crime, he was uttering words to the effect that he was causing injuries to the deceased because in his opinion the victim was having an intrigue with his wife We may further mention that in the course of the investigation of this case Shrimati Kamla and Kumari Meena Kumari were examined by the prosecution and as they were closely related to the appellant, it was considered necessary that a Magistrate should record their statements under section 164 Criminal Procedure Code The statement given by Shrimati Kamla also fully supported the version mentioned above No doubt we cannot use the statement of Shrimati Kamla under section 164 Criminal Procedure Code, because it is not a substantive piece of evidence It can only be used either to corroborate the statement of Shrimati Kamla or to contradict her and for no other purpose The prosecution did not examine Shrimati Kamla in this case, but the court examined her as a court witness Shrimati Kamla resiled from her former statement and claimed that she was as chaste as Caesar's wife She was confronted with her earlier statement and she gave absurd explanations as to how that statement came to be recorded It is, therefore, obvious

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that Shrimati Kamla is not willing to speak the truth The same thing is noticeable in the statement of Meena Kumari also For some reason the defence instead of accepting the allegation contained in the prosecution case preferred to take up the stand that there was no substance in these allegations and even the crime was not committed in the orchard The trial court made no mistake when it accepted the evidence of the two eye witnesses Jamil Ahmad and Yakub, and rejected the statements of Shrimati Kamla and Meena Kumari We are therefore of the opinion that where the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception whether he pleads it or not In such a case the charge framed against the accused comes in conflict with the prosecution evidence itself

The rule of law that would be applicable to this case is laid down in *Mangal Ganda* v *Emperor* (1) In this case the Sessions Judge found that the offence seemed to have been committed under a grave and sudden provocation but since the accused did not raise this plea, he could not accept it and sentenced the accused under section 302 Indian Penal Code The learned Judges observed

> This is obviously wrong Section 105 of the Evidence Act says nothing about pleas but places the burden of proof in certain circumstances on an accused person But if the prosecution has already performed that task for him it is clearly not necessary for him or anybody else to do it all over again For a court to say that a fact is not proved, which, after considering the matters before it it confidently believes to exist is to stultify itself and to go contrary to the dictates of common sense and the definition of proof in section 3 of the Evidence Act

This view is also supported by the observations in *The matter of Kali Churn Mookerjee* (2), which is a Bench decision of the Calcutta High Court A contrary view was taken in *Queen Empress* v *Timmal* (3), but this

(1) A I R 1925 Nag 37 (2) (1882) 11 Cal L R 332
(3) (1899) I L R 21 All 122

was again modified to a certain extent in *Emperor* v *Wajid Husain* (1) In *Wajid Husain's* case the learned Judges observed

> While we agree with what was laid down in *Queen Empress* v *Timmal* (2), we also hold that circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record but there must be evidence upon which such circumstances can be found to exist "

It therefore appears that where there are circumstances proved in the case whether by the prosecution or the defence to make an exception applicable, it is immaterial from which side that evidence is placed on the record, and the benefit of these circumstances cannot be denied to an accused on the ground that he did not plead the exception

In another Calcutta case *Kuli* v *Emperor* (3) it was held that where it was clear from the cross examination that an exception was being pleaded but the accused himself did not do so, it amounted to a misdirection to the Jury when the trial court asked them not to consider this plea as it was not the stand of the accused In this case also the counsel for the appellant was all the time pleading an exception and the trial court erred when it did not consider this plea The law does not prevent an accused from taking even an alternative plea and the court cannot confine its attention to the plea advanced by the accused himself and ignore the other plea which is manifest from the cross examination even though it is fully made out on the evidence No doubt in such a case the plea assumes the aspect of an argument but it must prevail if it is supported by evidence We are therefore, satisfied that the first question framed by us must be answered in favour of the appellant

(1) (1910) I L R 32 All 45 (2) (1899) I L R 21 All 122
(3) A I R 1936 Cal 442

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We will now take up the second question and mention the facts proved in the case

We find that the prosecution came forward with the allegation that an illicit intimacy was suspected by the appellant between his wife and the deceased It further collected evidence to prove that the appellant went to Kanpur and held a Panchayat there It further proved that the appellant shifted from Nishatganj to the Government House orchard and, therefore, the deceased could not have had any reason to come to the house of the appellant We have mentioned above that the deceased was no relation of Shrimati Kamla He was a maternal cousin of the appellant and if the appellant did not want thet he should come to his house, he had no business to go there Lastly it has proved that at the time of the commission of the crime the appellant was taunting the deceased with the illicit intimacy which he was carrying on with his wife The only fact which is wanting is that the prosecution did not admit specifically that there was actually illicit intimacy between the deceased and Shrimati Kamla In our opinion the circumstances mentioned above cannot leave any doubt in any reasonable mind that the persistence of the deceased in coming to the house of the appellant even in his absence could have been due to no other reason but because he was carrying on an intrigue with Shrimati Kamla The appellant did not take any drastic action against the deceased in the beginning He first tried to get rid of his wife and then he shifted his place of residence, yet the deceased kept on visiting his house in his absence These circumstances lead only to one conclusion, namely, that the deceased was having an illicit intimacy with Shrimati Kamla The denial of Shrimati Kamla or even the denial of the appellant himself cannot take away the evidentiary value of these circumstances

We have now to consider whether the circumstances proved amount to a grave and sudden provocation or not There are innumerable cases where it has been held that where the husband surprises his wife in a compromising position with another man, it amounts to a grave

and sudden provocation In other words, where knowledge that his wife is unfaithful to him comes all of a sudden to the husband it is considered likely that he may lose his self control and act in a wild manner The question arises whether in the absence of actually seeing one's wife in a compromising position the sudden appearance of a lover would amount to a sudden provocation or not In our opinion this would depend upon the background and the circumstances of the case The law nowhere lays down that only an occular proof can bring a conviction of illicit intimacy Where the circumstances can be interpreted only in one way by any reasonable person, the mental picture which will form in the mind of the husband by what he saw would be just as potent and powerful to disturb his mental balance and make him lose his self control as the occular proof itself In *Desraj v Emperor* (1) the accused found his wife seated on the same cot with a man whom he had expelled from his house only a day previously and losing his self control he killed him It was held that he must be considered to have received a grave and sudden provocation We do not see any difference between finding the lover inside the house and finding him seated on the same cot Both these circumstances in the background of other facts were sufficient to convince the absent husband about the infidelity of his wife and provoke him to an ungovernable rage The subsequent act of killing was, therefore, not the outcome of any brutal and diabolical malignity but a consequence of human frailty to which all are liable

Where the husband is living in a fool's paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and this intimacy was continuing all the time this in our opinion would amount to a sudden knowledge which would come as a shock to him The appellant when he came to reside in the Government House orchard felt that he had removed his wife from the influence of the deceased and

(1) (1928) 29 Cr L J 484

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there was no more any contact between them He had lulled himself into a false security This belief was shattered when he found the deceased at his hut when he was absent This would certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden We therefore accept the contention advanced by the counsel for the defence that the circumstances established in this case prove that the appellant when he killed the deceased had lost his self control because of a grave and sudden provocation

For the reasons given above we think that an offence under section 302 Indian Penal Code is not made out against the appellant His conduct is protected by Exception 1 to section 300 Indian Penal Code His offence falls under section 304, Indian Penal Code, and he can be convicted only under this section

It is to be determined now as to what sentence should be imposed upon the appellant under section 304 Indian Penal Code We feel that the appellant was really a victim of circumstances and his own fault was only to this extent that he could not control himself better and he became absolutely wild The deceased pursued the wife of the appellant even to the Government House orchard and in spite of the earlier displeasure clearly exhibited by the appellant, the deceased did not mind continuing this intimacy He came stealthily at a time he thought the appellant would be away Shrimati Kamla was obviously equally guilty for without her encouragement and active co operation this intrigue could not have continued We are, therefore inclined to take a lenient view of the crime committed by the appellant In our opinion a sentence of five years rigorous imprisonment would meet the ends of justice in this case The appellant is acquitted under section 302 Indian Penal Code but convicted under section 304 Indian Penal Code and sentenced to five years rigorous imprisonment

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v
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Mulla J

Before parting with this decision we would like to observe that it is highly undesirable that where the longest term of imprisonment is awarded to an accused person, this punishment should be supplemented by an additional sentence of fine The trial court either misread the words of section 302 Indian Penal Code, and thought that it was obligatory to impose a sentence of fine, or it was of the opinion that even a sentence of life imprisonment was not enough and something else should be added to this sentence This Court has expressed its view repeatedly in several cases and if we mistake not even in those cases which have come up to this Court from Lucknow It is therefore, surprising that the observations made by this Court are not read by the lower court for we would not go to the extent of believing that they are being deliberately disregarded We therefore set aside the sentence of fine of Rs 100 imposed upon the appellant The fine if deposited should be refunded

With the modifications mentioned above this appeal is dismissed

Sentence modified

CIVIL MISCELLANEOUS

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*Before Mr Justice V D Bhargava and Mr Justice Misra**

1959

August 3

PREM NARAIN TANDON (PETITIONER)

v

THE STATE OF UTTAR PRADESH AND ANOTHER (OPPOSITE PARTIES)

University—*Election for the Court of the University from the Donors Constituency and from the Constituency of Registered Graduates—Nomination to the Executive Council of the University—Terms to expire by Ordinance—Ordinance validity of—U P Universities Ordinance 1 of 1959 validity of—Removal of Difficulties (Fourth) and (Sixth)*

*Sitting at Lucknow

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PREM NARAIN TANDON v. THE STATE OF UTTAR PRADESH

Orders of 1958 and 1959 validity of—Constitution of India 1950 Art 226 scope of

The Lucknow University Act 1920 was amended by Act VI of 1955 which came into force on 23rd March 1955 According to that Act 15 members were to be elected for the Court of the University from amongst the donors and 30 members were to be elected from the Constituency of Registered Graduates and five members were to be nominated to the Executive Council of the University by the Chancellor

Anand Narain, the petitioner was elected from the Donors Constituency as a member of the Court of the Lucknow University on 7th August 1956 for a period of three years and his term expires on 6th August 1959 Sidh Nath Misra was elected from the Registered Graduates Constituency as a member of the Court of the Lucknow University on 4th August, 1956 for a period of three years and his term expires on 3rd August 1959 Prem Narain Tandon was nominated to the Executive Council on 9th October 1956 for a period of three years and his term expires on 8th October 1959

The Removal of Difficulties (Fourth) Order amended the Removal of Difficulties (Second) Order to the extent that the authorities constituted prior to the commencement of Act VI of 1958 shall continue not later than 15th January 1959 notwithstanding the provisions of the Act or the Statutes in force before 7th May 1958 The effect of this order was that Anand Narain and Sidh Nath were to discontinue as members after the 15th January 1959

The Registrar of the Lucknow University the respondent no 2 issued a notice calling for nominations under the new Statute and Act VI of 1958 and fixed 29th October 1958 as the last date for filing nomination papers for the donors Constituency he also fixed 31st October 1958 as the last date for filing nomination papers from the Registered Graduates Constituency Anand Narain and Sidh Nath Misra the petitioners filed separate writ petitions on 24th and 28th October 1958 respectively challenging the validity of the Removal of Difficulties (Fourth) Order of 1958 The nomination of Prem Narain Tandon is determined by the Removal of Difficulties (Sixth) Order of 1959 issued on 5th January 1959 which determined all nominations with effect from 16th January 1959 Prem Narain Tandon filed this writ petition challenging the validity of the Removal of Difficulties (Sixth) Order of 1959

Held that the U P Universities Ordinance no 1 of 1959 in no way purports to affect the powers of the High Court It may have affected the rights of a party before the High Court but the powers in the High Court have remained the same If an Act is passed during the pendency of the case which affects

the rights of the parties it cannot be said that there has been any derogation from the powers of the High Court which endangers the position of that Court which by the Constitution is designed to fill The validity of the Ordinance is not affected on this ground

Held that the Ordinance passed does not only affect the Lucknow University about which writ petitions are pending in this Court but it has also amended Allahabad Agra and Gorakhpur Universities Acts It was promulgated on 22nd June 1959 when the session of the University soon thereafter was going to start and that would be the right and proper time if any change was required to be introduced so that there may be a new set up of administration from the very beginning of the session

Apart from the fact that the circumstances in which an Ordinance is passed is not justiciable this Ordinance cannot be termed to be a *mala fide* one

Lakhi Narayan Das v *The Province of Bihar* (1) *Emperor* v *Benoarilal* (2) relied on

Held that it is only when a Statute does not specially and in clear words take away vested rights that a Statute will be deemed to be prospective It is open to a legislature to take away a vested right by legislation particularly if it has been vested by a legislation itself

Held also that there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the petitioners

United Provinces v *Mst Atiqa Begum* (3) *Sudhya Ranjan* v *Mahamated Isaal*, (4) *Sylhet Loan and Banking Co Ltd* v *Syed Ahmad Mattoba* (5) *Shivpujan Rai* v *Bishunath Rai* (6), *K C Mukerjee* v *Mt Ramratan Kuer* (7) considered

Held that after coming into force of this Ordinance the petitioners have no right left and the petitions must be dismissed

Held that Universities are autonomous bodies and the courts should be reluctant as far as possible to interfere with the internal administration of the Universities There should be no occasion for any interference unless there is a palpable violation of law which has occasioned injustice in a broad and general sense The rights of the petitioners are such which needed no interference by the High Court when their terms were determined

Sangram Singh v *Election Tribunal Kotah* (8) relied on

(1) A I R 1950 F C 59
(2) (1944-45) 72 I A 57
(3) A I R 1951 F C 16
(4) A I R 1950 Bom 236
(5) A I R 1941 Cal 337
(6) A I R 1930 All 706
(7) A I R 1936 P C 49
(8) A I R 1955 S C 425

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Civil Miscellaneous Writ no 16 of 1959 connected with writ petitions nos 222 and 232 of 1958

The facts appear in the judgment

B K Dhaon for the applicant

The Advocate General, Standing Counsel and *U S Srivastava* for the opposite parties

The judgment of the Court was delivered by—

V D BHARGAVA, J —These are three connected writ petitions filed by three members two of whom that is, Anand Narain and Sidh Nath Misra, petitioners in Writ Petitions nos 222 and 232 of 1958, had been elected as members of the Court of the Lucknow University, while Prem Narain Tandon petitioner in Writ Petition no 16 of 1959 was nominated by the Chancellor as member of the Executive Council of the Lucknow University Petitioner Anand Narain had been elected on the 7th August, 1956, for three years and his term expires on the 6th August 1959 Petitioner Sidh Nath Misra was elected on the 4th August 1956 for a period of three years and his term expires on 3rd August 1959 Prem Narain Tandon was nominated on the 9th of October, 1956 for a period of three years and his term expires on the 8th October 1959

Lucknow University Act, (Act V of 1920) is the main Act which had been amended several times later The important amendment in question is the amendment of the Lucknow University Act by Act VI of 1955 which came into force on 23rd March 1955 According to that Act as amended by Removal of Difficulties Orders of the State Government and Statutes framed thereunder fifteen members were to be elected for the Court of the University from amongst those donors who had given donations between Rs 500 and Rs 20 000 thirty members were to be elected from the Constituency of Registered Graduates and five members to be nominated to the Executive Council of the University by the Chancellor Anand Narain petitioner was one of those who had been elected from the Donors Constituency Sidh Nath Misra from the Registered Graduates Constituency, while Prem Narain Tandon had been nominated to the Executive

Council There have been about six orders named as Removal of Difficulties Orders they being called first second third fourth fifth and sixth order Among them Removal of Difficulties (Fourth) Order was issued by the respondent no 1 the State Government by which the Removal of Difficulties (Second) Order was amended to the extent that the authorities constituted prior to the commencement of Act VI of 1958 shall continue not later than 15th January 1959 notwithstanding the provisions of the Act or the Statutes in force before 7th May 1958 7th May 1958 is the date on which the Statutes were framed under Lucknow University (Amendment) Act no 6 of 1958 The effect of this order was that so far as Anand Narain was concerned he was not to continue as a member of the Court after 15th January, 1959 Similarly, Sidh Nath Misra was also not to continue as a member after that date As new elections had to be made under the new set up on the 14th October 1958 respondent no 2 that is the Registrar of the Lucknow University issued a notice calling for nominations under the new Statutes and Act VI of 1958 and fixed 29th October 1958, as the last date for filing nomination papers for the Donors Constituency and by another notice dated 16th October 1958 the Registrar issued a notice calling for nominations under the new Statutes and Act VI of 1958 and fixed 31st October 1958 as the last date for filing nomination papers from the Registered Graduates Constituency The petitioners Anand Narain and Sidh Nath Misra came to this Court with writ petitions on 24th October and 28th October respectively and got an interim stay order from this Court staying the elections of the new members

The nomination of Prem Narain Tandon was determined by the Removal of Difficulties (Sixth) Order of 1959 issued on 5th January 1959 which determined all nomination with effect from 16th January, 1959 Petitioners Anand Narain and Sidh Nath Misra challenge the validity of the Removal of Difficulties (Fourth) Order of 1958 while the petitioner Prem Narain Tandon challenges the validity of the Removal of Difficulties (Sixth) Order of 1959

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At the outset it may be noticed that there are only just a few days left till when Sidh Nath Misra and Anand Narain are to continue as members of the Court. As already mentioned, Sidh Nath Misra's membership expires on 3rd August 1959 and that of Anand Narain on 8th August. The right of Prem Narain also to be a member of the Executive Council would expire soon after that is on 8th October, 1959. The writ petitions of Anand Narain and Sidh Nath Misra had been filed in October 1958 and for about nine months they have succeeded in their attempt by means of an interim stay order. Since the period of Anand Narain and Sidh Nath Misra is about to expire, their writ petitions have no particular practical utility. Prem Narain Tandon also in spite of the fact that his membership had been terminated from 16th January, 1959 has continued to be a member by means of an *ad interim* stay order. To a great extent all the three petitions have succeeded virtually in their attempt to continue to be the members practically till the end of their term, without their writs being decided.

By notification no. 1422/XVII-246/1959 dated 22nd June, 1959, the Governor was pleased to issue the U. P. Universities Ordinance no. 1 of 1959 which had been promulgated by the Governor on 22nd June, 1959. That amended the English translation of the Uttar Pradesh Vishwavidyalaya Adhyadesh 1959, (Uttar Pradesh Adhyadesh Sankhya 1 of 1959). The said Ordinance amended certain sections of the different Universities of Uttar Pradesh including that of the Lucknow University, Allahabad University, Agra University and Gorakhpur University. In the present case we are concerned only with the amendment so far as the Lucknow University is concerned. By clause 4 of that Ordinance, the Lucknow University (Amendment) Act, 1957, was amended by making the following alterations—

(1) In sub-section (2) of section 11 for the word "twelve", the word "thirty" shall be substituted

(2) after section 11 the following shall be added as a new section 11 A

11 A The term of—

(i) any member elected or nominated to any Authority or Body of the University under the provisions of the Principal Act or this Act or the Statutes framed under any of the said two Acts or

(ii) any officer of the University and any member holding office in or membership of an Authority or Body of the University as the case may be by rotation in order of seniority or in order of preference in accordance with the provisions of the aforementioned Acts and Statutes shall be and be deemed to have been, determined with effect from the date or dates mentioned in the orders and notifications issued or purporting to have been issued in this behalf by the State Government under this Act or the Statutes framed thereunder as if this Act had been in force on all material dates anything contained in any law applicable to the University to the contrary notwithstanding and

(3) for sub section (1) of section 12 the following shall be substituted

(1) The State Government may, for the purposes of removing any difficulty particularly in relation to the transition from the provisions of the Principal Act to the provisions of that Act as amended by this Act by order published in the official *Gazette*—

(a) direct that the Principal Act or the Principal Act as amended by this Act shall, during such period as may be specified in the order, take effect subject to such adaptations whether by way of modification addition, or omission, as it may deem to be necessary or expedient or

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(*b*) direct by whom and in what manner the powers duties and functions of the University Authorities shall be exercised or discharged as the case may be till such time as they are constituted according to the Statutes framed under section 11 or

(*c*) make such other temporary provisions as it may deem to be necessary or expedient

Provided that no such order shall be made after thirty months from the date of commencement of this Act

This Ordinance has in effect given legality to the different Removal of Difficulties Orders that had been passed before that date In any event the new section 11 A determined the term of all elected and nominated members with effect from the date mentioned in the orders and notifications issued on behalf of the State Government under the Lucknow University (Amendment) Act 1957 or the Statutes framed thereunder that is to say it legalized those orders and unless the validity of this ordinance is challenged on the ground of being beyond the jurisdiction of the Governor or being *ultra vires* or unconstitutional or on any other ground the writ petitions have no force It is now after the issuance of this Ordinance not open to the petitioners to challenge the orders which had been passed previously Even if for the sake of argument it be accepted that those orders were unconstitutional or illegal but since the notifications issued under those orders have been now legalized by this Ordinance we do not think it is open to the petitioners to argue their petitions on the original grounds Therefore *Sri B K Dhawan* counsel for the applicants rightly conceded that the original grounds on which the petitions were filed have ceased to exist and further conceded that in case this Ordinance cannot be challenged he has no right to ask for the issue of a writ He however attempted to challenge this Ordinance on grounds *inter alia* that this Ordinance is unconstitutional that it is not a *bona fide* act on behalf of the Governor that this Ordinance is not retrospective and in any event

cannot affect the vested rights of the petitioners in a pending proceeding in a court of law

The first ground on which this Ordinance was attacked was that it has been promulgated without instructions from the President It is, therefore, hit by Article 213, read with Article 200 Article 213 of the Constitution of India provides as follows

> If at any time except when the Legislative Assembly of a State is in session or where there is a Legislative Council in a State except when both Houses of the Legislature are in sessions, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action he may promulgate such Ordinances as the circumstances appear to him to require
>
> Provided that the Governor shall *not, without instructions from the President*, promulgate any such Ordinance if—
>
> (a)
>
> (b)
>
> (c) An act of Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President it had received the assent of the President

It was argued that it was one of those legislations, which did require the assent of the President because it would come under the second proviso of Article 200, which is in the following words

> Provided further that the Governor shall not assent to but shall reserve for the consideration of the President any Bill which in the opinion of the Governor would if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill

The learned counsel for the applicants contended that the Legislature has in effect taken away the powers of the High Court and had made it helpless on account of

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this Ordinance and therefore it derogated the High Court from the powers which it possessed under the Constitution, and it being an Ordinance of such a nature, by proviso (c) to Article 213 it should have received instructions from the President before it could be promulgated.

We are unable to agree with this contention. This Ordinance in no way purports to affect the powers of the High Court. It may have affected the rights of a party before the High Court, but the powers of the High Court have remained the same. If an Act is passed during the pendency of a case which affects the rights of the parties it cannot be said that there has been any derogation from the powers of the High Court which endangers the position of that Court which by the Constitution it is designed to fill. This argument, therefore does not affect the validity of the Ordinance.

It was urged that this Ordinance is not a *bona fide* one. The Legislature had their sittings some time before this Ordinance was passed and they were again going to sit in the month of July and it is only a few days before the session of the Assembly was to start that this Ordinance was passed and, therefore, the Governor had abrogated the powers of the Legislature. It was further argued that there did not appear to be any particular necessity for passing any Ordinance at that particular time and there was no occasion for the Governor on 22nd June 1959 to promulgate that order. The validity of an Ordinance promulgated by a Governor on the ground that there was sufficient reason for promulgating the Ordinance cannot be questioned in a court of law. By Article 213 it is the Governor who is to be satisfied that circumstances exist which render it necessary for him to take immediate action and we cannot substitute the satisfaction of the Governor with the satisfaction of the Court. The only condition, by which a Governor is restricted and which is an absolute condition is that the Legislature must not be in session at that time. Even if the Legislature in session, the Governor may prorogue the Legislature and thereafter make the Ordinance.

Lakhi Narayan Das v *The Province of Bihar* (1) was a case under section 88 (1) of the Government of India Act (1935) which section was equivalent to Article 213 It was held there that—

> The language of section 88 (1) shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance The existence of such a necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test

In Emperor v *Benoarilal* (2) and in *Bhagat Singh* v *Emperor* (3) their Lordships of the Privy Council had held on a similar provision for the Governor General, that the emergency which calls for immediate action has to be judged by the Governor General alone On promulgating an Ordinance the Governor General is not bound as a matter of law to expound reasons therefor, nor is he bound to prove affirmatively in a court of law that a state of emergency did actually exist In our opinion Article 213 of the Constitution postulates only one condition namely the satisfaction of the Governor as to the existence of justifying circumstances which is not liable to be challenged in a court of law

It is true that there are also some authorities for the principle of law that abuse of the power is no exercise of the power and it has been often held with the approval of the Privy Council that an order made *mala fide* under the powers given by an Act or Ordinance is no exercise of such powers This was conceded by their Lordships of the House of Lords in *Liversidge* v *Sir John Anderson* (4) but in that case there should be definite evidence of *mala fide* There is no material upon which we could hold that the orders were *mala fide* Simply because they had been passed when the Legislatures were not in session or because they might affect the rights of parties in a pending litigation would be no ground to hold that the Ordinance was a *mala fide* one

(1) A I R 1950 F C 59
(2) (1944-45) L R 72 I A 57
(3) (1930 31) L R 58 I A 169
(4) L R [1942] A C 206

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Apart from the fact that the circumstances in which an Ordinance is passed is not justiciable we think that this Ordinance cannot be termed to be a *mala fide* one It has been passed not only affecting the Lucknow University about which writ petitions are pending in this Court but it has also amended Allahabad Agra and Gorakhpur Universities Acts It had been promulgated on 22nd June 1959 when the session of the University soon thereafter was going to start and that would be the right and proper time if any change was required to be introduced, so that there may be a new set up of administration from the very beginning of the session

The main theme of the argument of the learned counsel for the petitioners was that this Ordinance actually did not affect a pending petition Reliance has been placed on the general principles of interpretation of a Statute Reliance was also placed on the following authorities by the learned counsel for the applicants The first case is *United Provinces* v *Mt Atiqa Begum* (1) where SULAIMAN J, had held

> Undoubtedly an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits Courts have undoubtedly leaned very strongly against applying a new Act to a pending action when the language of the Statute does not compel them to do so It is a well recognized rule that Statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being litigated When a Statute deprives a person of his right to sue or affects the power or jurisdiction of a court in enforcing the law as it stands its retrospective character must be clearly expressed Ambiguities in it should not be removed by courts, nor gaps filled up in order to widen its applicability It is a well established principle that such Statutes must be construed strictly and not given a liberal interpretation'

(1) A I R 1941 F C 16

There can be no dispute with the proposition laid down by the Federal Court and we most respectfully agree not only with these observations but also with other observations which had been made in other cases which had been cited by the learned counsel for the petitioners

An other case on which reliance was placed is *Sudkya Ranji* v *Mahammed Issak* (1) wherein it was held that—

> Where the Statute is passed pending an action as distinct from after the date of the cause of action it has been held that strong and distinct words are necessary to alter the vested rights of either litigant as they stood at the commencement of action

Thus according to this decision we must interpret the Statute itself in order to see whether there are distinct and strong words or not, which have altered the vested rights of the petitioners If they are it is open to the Legislature to do so in spite of the fact that they are affected in a pending suit The distinction between the rights in a pending suit and other rights is usually drawn when the Legislature passes a Statute which affects the rights of bringing a suit or a Statute affecting the right of appeal or affecting jurisdiction of a court In that event there may be a pertinent question which may arise as to whether the right to proceed with the suit or appeal without the Act being made specially retrospective, would affect the pending suits or the right of appeal But if a Statute takes away a certain right from a certain party retrospectively in our opinion his rights would be deemed to have been taken away whether they are involved in a pending suit or not The other cases, as we shall presently see, cited by the learned counsel are also cases where it was the right of suit or appeal or the jurisdiction of the court, which had been affected and the court was called upon to see whether the right of suit or appeal was affected These cases in our opinion do not directly apply to the facts of the present case

The case of *Sylhet Loan and Banking Co, Ltd* v *Syed Ahmad Majtoba* (2) is again a case in which the right of

(1) A. I. R. 1959 Bom 236 (2) A I R 1946 Cal 337

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suit had been affected and in that case it was held that unless there was a clear intention of the Legislature to the effect that the pending suits would also be affected new legislation would not affect the pending cases By an amending Act of Assam Money Lenders Act it was provided that no money lender shall, in respect of any loan made before or after the commencement of the Act recover, on account of interest and principal, whether through court or otherwise a sum greater in aggregate than double the principal of the loan On these terms their Lordships had held that the section was not retrospective and it was only to affect suits which were filed after the Act It was on interpretation of language of that Statute that the Court had come to that conclusion

The case of *Sheopujan Rai* v *Bishunath Rai* (1) cited by the learned counsel was a case where the Agra Pre emption Act had been amended retrospectively and affected the pending suits and a Bench of this Court had held

> It is well settled that a new enactment passed during the pendency of an action has not a retrospective effect unless either it expressly says so or it lays down a mere rule of procedure which it is the duty of courts to follow On the other hand if the amendment relates to substantive rights, as distinct from the adjective law it cannot affect vested rights and therefore would not be applicable to pending actions

On the basis of this observation it was argued that since this present legislation is not a change in the adjective law, but in the substantive law affecting vested rights, therefore, it should not be deemed to be retrospective Their Lordships in that case came to the conclusion

> The Act before us is nothing like either of these two enactments and there is absolutely nothing either in the body of the Act its title preamble, or marginal notes which would indicate that it was intended to have retrospective effect

(1) A I R 1920 All 706

In the present case, if we read clause 4 of the Ordinance it is clear that it is meant to have a retrospective effect It has been clearly mentioned there that the term of a member shall be and be deemed to have been determined with effect from the date or dates mentioned in the orders and notifications Therefore, this Ordinance was to come retrospectively into effect from the date on which the previous notifications had been issued There cannot be any manner of doubt, that so far as the reading of this Ordinance was concerned it was a piece of legislation which retrospectively affected a vested right and there had been no reservation of the rights of a petitioner in any pending action Since in our opinion there are clear words in the Ordinance which show that they are of a retrospective nature and they take away the rights of the petitioners we need not cite further authorities relied upon by the learned counsel for the petitioners Every decision has laid down the general proposition that unless a legislation makes an Act specifically retrospective it shall not affect an existing vested right, and if according to our interpretation the present Ordinance has not only impliedly and by its intention but expressly taken away the rights retrospectively then, by no manner of interpretation of Statutes it can be said that the vested rights have been preserved It is only when a Statute does not specially and in clear words take away a vested right that a Statute will be deemed to be prospective It is open to a Legislature to take away a vested right by legislation particularly if it had been vested by a legislation itself

The only case which to us appears to be on the point is *K C Mukerjee* v *Mt Ramratan Kuer* (1) That was a case where during the pendency of the appeal before the Privy Council a legislation was passed which took away the vested rights of the appellant before the Privy Council and their Lordships said

> In these circumstances it appears to their Lordships that unless some savings can be implied as regards occupancy holdings which at the date of the

(1) A I R 1936 P C 49

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commencement of the Act are in question in a pending suit, section 26 (N) must be applied to the present case and the plaintiff's appeal must fail *in limine* Their Lordships are of opinion that no such saving can be implied

In that case their Lordships had made it clear that legislations which affect suits are different from those in which vested rights are directly taken away They have further observed

> Section 26 (N) is not a provision to the effect that no action shall lie in certain circumstances nor has it any reference directly to litigation Its provision is that every person claiming an interest as a landlord shall be deemed to have given his consent to every transfer made before 1st January, 1925 This is retrospective

The present legislation also is not about certain action being brought in certain circumstances nor it has any reference directly to any litigation In the circumstances we are definitely of opinion that, after the coming into force of this Ordinance the petitioners have no right left and therefore the petitions must be dismissed

Apart from this Ordinance, which has taken away the rights we must bear in mind that the jurisdiction given under Article 226 of the Constitution is a special and peculiar right It is for the enforcement of fundamental rights conferred by Part III of the Constitution or for any other purpose So far as the enforcement of the fundamental rights is concerned it may be that the petitioner might insist as of right on their enforcement, but so far as other matters are concerned, it is purely in the discretionary jurisdiction of the High Court whether it would grant it or refuse it Their Lordships of the Supreme Court have in very clear terms explained the jurisdiction of this Court In *Sangram Singh* v *Election Tribunal, Kotah* (1) they observed

> That however is not to say that the jurisdiction will be exercised whenever there is an error of law

(1) A I R 1955 S C 425

> The High Courts do not and should not, act as courts of appeal under Article 226 Their powers are *purely discretionary* and though no limits can be placed upon that discretion, it must be exercised along recognized lines and not arbitrarily and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case *unless substantial injustice has ensued, or is likely to ensue They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense* Therefore writ petitions should not be lightly entertained in this class of cases

Universities are autonomous bodies and the courts should be reluctant as far as possible, to interfere with the internal administration of the University There should be no occasion for any interference unless there is a palpable violation of law which has occasioned injustice in a broad and general sense In the present case we do not think that the rights of the petitioners were such which needed any interference by this Court when their terms were determined

It is not a case where the petitioners alone had been removed and certain other persons had been substituted The entire body of management including the court and the executive council was to be overhauled The present petitioners had every right and possibly would have been again elected or nominated, particularly if they had rendered useful service on the bodies of the University We think that in case, the entire management was desired to be changed, this Court should hesitate to interfere in the management of an autonomous educational body

Another ground on which, at the present moment, we should not grant a relief is that, in any event, even if the rights of the petitioners had not been taken away retrospectively they at least, had been taken away from the date of the Ordinance, that is 22nd June 1959 At the present moment granting any relief would be virtually

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ineffective and merely of academic interest The courts should be reluctant to grant such reliefs This was the view also taken by a single Judge of the Calcutta High Court in *Subodh Kumar Bose v Commissioner of Krishnagar Municipality* (1)

No other arguments were urged before us

We see no force in any of the writ petitions which, we accordingly dismiss with costs and assess the costs of the opposite parties at Rs 100 in each petition, which they are entitled to receive from the petitioners

Petitions dismissed

APPELLATE CIVIL

*Before Mr Justice V D Bhargava and Mr Justice Misra**

JANKI PRASAD HANUMAN PRASAD (DEFENDANT)

v

HARISH CHANDRA TEWARI (PLAINTIFF)

1959

August 3

Landlord and Tenant—*House—Suit for ejectment—Purchase of a house—Application for possession—Permission by the Rent Control and Eviction Officer—Notice under s 106 Transfer of Property Act, 1882—Permission under s 3 of the U P Control of Rent and Eviction Act 1947—Notice validity of—Transfer of Property Act 1882 s 106 and Control of Rent and Eviction Act 1947 s 3 applicability and scope of—Suit maintainability of*

In suit no 165 of 1955 the plaintiff became the owner of a house by means of a sale deed dated the 28th June 1955 He then tried to obtain possession of the house He sought permission of the Rent Control and Eviction Officer to eject the defendant and an order dated the 5th December 1955 was passed as follows

> I allow eight months time to the opposite party no 1 and six months to opposite party no 4 from the date of making this order to find out premises for themselves The applicant will be permitted if the opposite parties nos 1 and 4 do not vacate the house within the given time

The house was not vacated and a notice dated 19th December 1954 purporting to be under s 106 Transfer of Property

(1) A I R 1956 Cal 393

*Sitting at Lucknow

Act was served upon the defendant no 1 on 21st December 1954 in which he was asked to vacate the premises by the 31st January 1955

In between on the 20th December 1954 the plaintiff filed an application for permission under s 3 of the Control of Rent and Eviction Act for filing a suit On the 19th February 1955 permission was granted by the Rent Control and Eviction Officer and on the 14th April 1955, after obtaining permission the suit was filed

The defendant went up in appeal against the order under s. 8 to the Commissioner and the appeal was allowed on the 14th August 1955 with the result that there was then no existing permission The plaintiff filed a revision against the order of the Commissioner to the State Government and on the 7th January 1956 before the suit was disposed of the State Government allowed the revision set aside the order of the Commissioner and restored the permission granted by the Rent Control and Eviction Officer on the 19th February 1955

The defence to the suit was that the notice under s 106 Transfer of Properties Act dated 19th December 1954 was given prior to the obtaining of permission which was granted on the 19th February 1955 and therefore notice was ineffective and the suit was bad in law

Held that the permission was granted by the order dated the 8th December 1955 but even if no permission was granted it was permissible for the plaintiff to give a notice under s 106 Transfer of Properties Act even prior to permission having been granted under s 3 of the Control of Rent and Eviction Act

Held that a notice under s 106 Transfer of Property Act will not be dependent on the existence of permission It can be given before the permission simultaneously on the same date when the permission is sought and accorded or after the permission has been granted The notice was a valid one and the suit was decreed

Shrimati Buddey v *Shrimati Mahadevi* (1) *Ram Pratap* v *Sri Panna Lal* (2) *Shri Deo Prasad* v *Shri Janki Prasad* (3) *Bhagwan Das* alias *Lalta* v *L Pyare Lal* (4) relied on

Special Appeal no 16 of 1958 from a decision of Gurtu J dated 23rd April 1956

Iqbal Ahmad and *V N Seth* for the appellant

S D Misra, *A N Trivedi* and *R R Sahai* for the respondent

(1) 1954 A L J 35
(2) 1956 A L J 287
(3) 1955 A L J 403
(4) 1956 A L J 638

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JAMEI PRASAD HANUMAN PRASAD v. HARISH CHANDRA TIWARI

The judgment of the Court was delivered by—

V D BHARGAVA, J —These are two connected special appeals against the judgment of a learned single Judge of this Court by the plaintiff of two different suits They were connected because common questions of law arose Both the appeals were disposed of by the learned single Judge by one judgment

The facts of the case arising out of Regular Suit no 165 of 1955 are as follows The plaintiff claimed to be the owner of house no 288/63 Ashbagh, Yahiyaganj Ward, Lucknow by means of a purchase dated the 29th of June, 1953 Ex 9 He alleged that defendant no 1 was his tenant and defendant no 2 was the sub tenant, that he obtained permission from the Rent Control and Eviction Officer to eject the defendants and also gave notice under section 106 of the Transfer of Property Act but since the defendants have not vacated the premises, hence the suit The plaintiff further alleged that the defendants were in arrears of rent and defendant no 1 had sublet to defendant no 2 and on that ground also they were liable to ejectment The defence on behalf of defendant no 1 was that he was not liable to eject ment on the ground of sub tenancy or on the ground of arrears of rent that the notice given under section 106 was invalid and since the plaintiff refused to accept the rent, he was not entitled to any decree on the basis of arrears of rent Defendant no 2 pleaded that he had been unnecessarily impleaded The trial court framed the following six issues

(1) Whether defendant no 1 committed default in payment of rent and if so its effect?

(2) Whether defendant no 1 was served with a valid notice?

(3) Whether plaintiff obtained permission to eject the defendant no 1?

(4) Whether defendant no 1 has spent Rs 30 10 6 on repairs and is he entitled to deduct the same?

(5) Whether defendant no 2 is unnecessary party?

(6) To what relief if any is plaintiff entitled ?

Issues nos 1 4 and 5 were actually not pressed in the trial court and the two important issues in the case were only issues nos 2 and 3 The learned Munsif held that the notice given by the plaintiff was a valid notice and the permission to eject the defendants had been obtained by the plaintiff and that had been confirmed by the State Government and therefore the suit was a proper suit and he accordingly decreed the plaintiff s suit with costs against the defendants The defendant went up in appeal to the District Judge of Lucknow The only point that was argued before the learned District Judge was whether the notice under section 106 of the Transfer of Property Act was a valid notice or not The learned District Judge held that the notice was invalid and, therefore the suits for ejectment were dismissed Similarly in the second suit also it was held by the trial court that the notice was a valid notice and therefore the suit was decreed but the learned District Judge had upset that finding and held that the notice under section 106 was invalid and therefore, he dismissed the suits Against the above two decisions there were two second appeals which came up before Hon GURTU, J who by his common judgment dated the 23rd April 1958 allowed both the appeals and decreed the plaintiff s suits with costs As the question involved was an important question of law he gave leave for special appeal in both the cases and these appeals have been listed before us for final hearing

In order to appreciate the real point involved in the appeal, it is necessary to give a few facts In suit no 165 of 1955 as we have already mentioned the plaintiff became the owner by means of a purchase dated the 29th June 1953 After the purchase he wanted possession himself Therefore he sought permission of the Rent Control and Eviction Officer to eject the defendant, who by an order, dated the 5th December 1953, Ex 4 decided in the following terms

> Considering all the facts in view, I hereby allow eight months time to the opposite party no 1 and six months to the opposite party no 4 from the

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date of making this order to find out premises for themselves The applicant will be permitted if the opposite parties nos 1 and 4 do not vacate the house within the given time

After this opposite party no 1 who is defendant appellant and was opposite party no 1 in the proceedings before the court did not vacate within eight months and there fore a notice dated the 19th December, 1954 purport ing to be under section 106 of the Transfer of Property Act was served upon defendant no 1 on the 21st December 1954, in which he was asked to vacate the premises by the 31st of January 1955

In between on the 20th December, 1954, the respon dent filed an application for permission under section 3 for filing a suit On the 19th of February, 1955 permis sion was granted by the Rent Control and Eviction Officer and on the 14th April 1955 after obtaining permission the suit was filed

The defendant appellant went up in appeal against the order of the Rent Control and Eviction Officer under section 3 to the Commissioner and the appeal was allowed on the 11th August 1955 with the result that there was then no existing permission The plaintiff respondent filed a revision against the appellate order of the Commissioner to the State Government and on the 7th January 1956 before the suit was disposed of the State Government allowed the revision set aside the order of the Commissioner and restored the permission granted by the Rent Control and Eviction Officer on the 19th February 1955

In the present case the plaintiff was actually a pur chaser and not an original owner and immediately after the purchase he had applied for permission to sue One of the question that arises is whether such a purchaser should have been allowed permission or not but that question is not justiciable and was within the exclusive jurisdiction of Rent Control and Eviction Officer It is true that the original owners may not be requiring the premises let out for their personal use and therefore may not be entitled to ask for permission but by

transferring the property, the original owners, thereby give a right to the purchaser to evict a tenant, who might be residing in the premises or carrying on business for a pretty long time and by thus selling and authorizing a new purchaser to evict the object of the Control of Rent and Eviction Act to a very great extent is frustrated As the preamble of the Act shows that due to shortage of accommodation, it was considered expedient to provide for the continuance of the powers to control the letting and the rent of such accommodation and to prevent the eviction of tenants there from In this way though the tenant may not have any apprehension of being evicted by the original owner a new purchaser may harass the tenant by his ejectment

That matter as we have said is not within our jurisdiction to consider It is for the State Government either to frame rules to the effect that a new purchaser for a limited period of five or ten years will not be entitled to ask for ejectment on the ground of his own personal need or to issue directions to the Rent Control and Eviction Officer to see that the tenants are not harassed by the purchasers, but if they do not choose to do so, we do not think that the tenant can get any assistance from this Court

On behalf of the appellant it was contended that the notice under section 106 of the Transfer of Property Act dated the 19th December, 1954 was given prior to the obtaining of permission which had been granted on the 19th February 1955 and therefore the notice under section 106 was ineffective According to the contention of the learned counsel for the appellant, section 106 of the Transfer of Property Act stood amended by section 3 of the Control of Rent and Eviction Act

Section 106 of the Transfer of Property Act begins with the words in the absence of a contract or local law or usage to the contrary and it was argued on behalf of the learned counsel for the appellant that the use of the words local law makes it clear that section 106 was subject to section 3 of the Control of Rent and Eviction Act Therefore unless the requirement of section 3 of the Control of Rent and Eviction Act had been fulfilled i e ,

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the permission had been obtained it was not open to the plaintiff respondent to give a notice under section 106 of the Transfer of Property Act and any notice given prior to the 19th of February, 1955 was an invalid notice and admittedly after the permission no notice under section 106 terminating the tenancy had been given and, therefore the suit is bad in law

Further, it has been argued that as soon as a notice under section 106 had been given after the expiry of the period mentioned in the notice, the tenancy would terminate and therefore the appellant could not be a tenant On the other hand by virtue of the provision of Control of Rent and Eviction Act, he continues to be a tenant and therefore there would be an inconsistency if we were to hold that a tenancy could be terminated prior to permission having been given by the Rent Control and Eviction Officer for filing a suit for ejectment and on this ground it was urged that the judgment of the learned single Judge was not correct

On behalf of the respondent besides the permission granted on the 19th of February 1955, reliance was also placed on Ex 4, dated the 5th December, 1958, and it was urged that the Rent Control and Eviction Officer had in fact granted permission to sue on that date and therefore the notice of the 19th of December 1954, could not be said to be a bad notice because it was given after the permission had been obtained, and in the alternative it was contended that it was not necessary to give a notice under section 106 after the permission had been obtained

We have considered the arguments of the learned counsel for the parties and we think that the judgment of the learned single Judge is correct

We might first deal with the notice dated the 19th February, 1955 In our opinion that is a permission, though it is a conditional permission Learned counsel for the appellant has argued that it was really not a permission because the order had said that the applicant *will* be permitted which means that he needed a second application Reading the order as a whole we think that the permission had been granted at that time and under the circumstances the other question does not

arise but for the sake of argument if we suppose that really no permission had been granted and possibly that might have also been the impression of the plaintiff, because he had applied for a fresh permission, we think that it was permissible for the plaintiff to give a notice under section 106 even prior to permission having been granted under section 3 of the Control of Rent and Eviction Act

The Transfer of Property Act has in no way been repealed by the Control of Rent and Eviction Act and, therefore, we have to interpret as if both the Acts are existing Chapter V of the Transfer of Property Act deals with the leases of immoveable property and in section 105 a lease has been defined as follows

> A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time express or implied or in perpetuity in consideration of a price paid or promised or of money, a share of crops service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms

From the above definition it is clear that a lease as contemplated under the Transfer of Property Act is a bilateral act, where in effect the transferor agrees to let and the transferee agrees to take a premises on lease on payment of a certain rent The word tenant has not at all been used Similarly, section 111 of the Transfer of Property Act also uses the word lease and there it has been said that a lease of immoveable property determines, amongst other grounds, on the expiry of a notice to determine the lease, or to quit or of intention to quit the property leased, duly given by one party to the other This would be a notice under section 106 of the Transfer of Property Act Therefore, what the Transfer of Property Act contemplates is the relationship of a lessor and a lessee between the so called landlord and the tenant The definition of a landlord and a tenant in the Control of Rent and Eviction Act is a little different A landlord has been defined in section 2 (*c*) as follows

> Landlord means a person to whom rent is payable by a tenant in respect of any accommodation

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and includes the agent attorney heir or assignee of such person

A tenant has been defined in clause (g) of the same section as follows

> Tenant means the person by whom rent is or but for a contract express or implied would be payable for any accommodation

The necessity of this definition was on account of the fact that by virtue of section 7 a tenant, even without the consent of the landlord could be imposed upon him A landlord and tenant may not have seen each other and yet the relationship of the landlord and tenant would come into being by virtue of the Act

Under these circumstances when a notice under section 106 of the Transfer of Property Act is given there may be an intention of termination of a lease and that may be deemed to have been terminated with the expiry of the term of their notice yet the relationship of the landlord and the tenant under the Control of Rent and Eviction Act would not cease till the tenant is liable to be evicted under section 3 either when the landlord has obtained permission to sue or any of the conditions mentioned in clauses (a) to (g) of section 3 (1) of the said Act comes into being Thus in our opinion a notice under section 106 will not be dependent on the existence of permission It can be given before the permission simultaneously on the same date when the permission is sought, and accorded, or after the permission has been granted

Even though a lease may be terminated, what section 3 of the Control of Rent and Eviction Act says is that the tenant would not be liable to eviction unless the conditions mentioned in section 3 are satisfied Section 3 of the Control of Rent and Eviction Act does not impose any restrictions on the landlord s right to termination of the lease but it imposes restrictions on his eviction i.e., actual turning out of the tenant from the premises There is no provision in the whole of the Control of Rent and Eviction Act whereby a tenancy could be determined and for the purpose it will be only the Transfer of Property Act which will be looked into

The whole object of the Control of Rent and Eviction Act, as we have already said, is to control the letting and the rent of such accommodation and to *prevent the eviction of tenants* therefrom due to the shortage of accommodation in Uttar Pradesh The emphasis in the preamble is on the actual eviction

There has been no direct case so far, dealing with the point which is directly in issue in the present cases but there have been cases where a tenant had been in default and a notice simultaneously under section 106 of the Transfer of Property Act and section 3 of the Control of Rent and Eviction Act had been given This Court had held that such a notice was a valid notice It was not necessary in such cases to wait for the expiry of the notice under section 3 before a notice under section 106 could be given Two of the cases on this point are *Shrimati Baddey* v *Shrimati Mahadevi* (1) and *Ram Pratap* v *Sri Panna Lal* (2) In the former case MALIK, C J, and ROY, J, held as follows

> A notice under section 106 of the Transfer of Property Act and a notice under section 3 of the U P (Temporary) Control of Rent and Eviction Act can be given simultaneously Because if the tenant makes payment within one month of the service of notice of demand, the landlord will have no right to file a suit by reason of the provisions of section 3 of the Control of Rent and Eviction Act

In the 1956 case a Bench consisting of AGARWALA *and* BEG, JJ, had held

> It is not necessary that a notice under section 106 of the Transfer of Property Act should be given after the expiry of one month as required by section 3 (1) (*c*) of the U P (Temporary) Control of Rent and Eviction Act The notice under section 106 Transfer of Property Act can be combined with the notice of demand of arrears within one month under section 3 (1) (*a*) of the U P (Temporary) Control of Rent and Eviction Act

In this case a notice was given under section 106 of the Transfer of Property Act, which required 15 days' notice,

(1) 1954 A L J 35 (2) 1956 A L J 787

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while a notice under section 3 of the Control of Rent and Eviction Act gave one month s time to the tenant to pay off the arrears of rent and it was argued that since the tenancy would be terminated earlier on account of the notice under section 106 of the Transfer of Property Act there would be an anomaly because the tenant will cease to be a tenant by virtue of clause (g) of section 111 of the Transfer of Property Act after 15 days, whereas he will not cease to be a tenant under section 3 (1) (a) of the U P (Temporary) Control of Rent and Eviction Act unless one month had expired and, therefore, it was contended that this anomaly can be removed only if the notice under section 106 of the Transfer of Property Act is given after the expiry of one month as required under section 3 (1) (a) of the U P (Temporary) Control of Rent and Eviction Act

This argument was very similar to the argument urged before us and it was repelled by the Bench in the following words

> We do not think that this is a necessary conclusion upon a reading of the provisions of the two Acts together The Transfer of Property Act is the general law of the land The U P (Temporary) Control of Rent and Eviction Act is a special and local enactment, and as such overrides the provisions of the general Act so far as it is in conflict therewith The two Acts have to be read together and the provisions of the general Act will stand amended to the extent of the inconsistency with the special Act Section 3 of the U P (Temporary) Control of Rent and Eviction Act creates a bar to the ejectment of a tenant Unless the bar is removed no tenant is liable to be ejected It follows therefore, that although the notice under section 106 of the Transfer of Property Act has been given, the tenant is not liable to be ejected until one of the conditions laid down in section 3 of the U P (Temporary) Control of Rent and Eviction Act is fulfilled Thus in spite of the expiry of the notice given under section 106 of the Transfer of Property Act, and in spite of the provisions of section 111 of the Transfer of Property Act, the tenant

does not cease to be a tenant till the bar to his eject ment laid down in section 3 of the U P (Tempo rary) Control of Rent and Eviction Act is lifted

We respectfully agree with the above observations and they fully apply to the facts of the present case It has been held in the Full Bench case of *Bhagwan Dass alias Lalla* v *L Pyare Lal* (1) that the permission of the District Magistrate for the eviction of a tenant from an accommodation must be taken to be one of the grounds mentioned in section 3 of the Act and therefore though by a notice under section 106 of the Transfer of Property Act read with section 111 of the same Act, a lease may be terminated, but the tenant is not liable to ejectment as one of the conditions, i e , the permission of the District Magistrate having not been obtained he would not be liable to ejectment To the same effect is the decision of a Bench of this Court in *Devi Prasad* v *Janki Prasad* (2)

The facts of the other case from which the other appeal arises may also be mentioned The plaintiff claimed to be the landlord of a house situate at Naubasta Lucknow and alleged that the defendant was his tenant on payment of Rs 11 4 per month as rent He served a notice under section 106 of the Transfer of Property Act on the 31st of March 1955 to quit and vacate the plaintiff s house within one month from the date of receipt of the notice He also applied for permission of the District Magistrate to file a suit On the 7th of June, 1955 the permission to file a suit after the expiry of six months from the date of the said order was accorded to him This period was to expire on the 7th December 1955 but the Control of Rent and Eviction Officer extended the period till the 30th of June 1956 There was a stay order as an appli cation in revision was pending before the State Govern ment under section 7 F of the Control of Rent and Evic tion Act but the State Government by its order dated the 2nd August, 1956, rejected the representation of the defendant and discharged the stay order The plaintiff served another notice on the 5th of September, 1955 under section 106 of the Transfer of Property Act A

(1) 1954 A L J 638 (2) 1953 A L J 403

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suit was filed on the 4th of August, 1956 which was numbered as Suit no 349 of 1956 The actual order of the discharge was set aside by the Rent Control and Eviction Officer on the 13th August, 1956 and, therefore, the plaintiff filed another suit which has given rise to the appeal before us, on the 13th August 1956 lest there may be a technical plea of the suit being premature In the present case the notice dated the 5th September 1955 had been served after the permission had been granted, though the permission was conditional and it was not open to the landlord to file a suit for ejectment yet permission had already been given Thus in the present case, of the defendant stands on much weaker grounds

Considering all the facts and circumstances of the case, we think that the decision of the learned single judge is correct and we accordingly dismiss both the appeals with costs

Learned counsel for the appellant in Special Appeal no 16 of 1958 has urged before us that the appellants had been carrying on their business in the premises for a pretty long time which is of a very extensive nature On account of dearth of accommodation it may not be possible immediately to get another accommodation, therefore, some time may be granted to the appellant during which they might be able to arrange for another accommodation Ordinarily, one month s time would have been enough as provided under section 106 of the Transfer of Property Act, but considering the dearth of accommodation we think six months time may be given to the appellant during which they should vacate the premises In case the premises are not vacated within six months, it will be open to the decree holder to apply for the execution of the decree for ejectment but during the period of six months the decree against the appellant of Special Appeal no 16 of 1958 shall not be executed With this modification as already ordered, the appeal stands dismissed

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice V D Bhargava and Mr Justice Nigam**

RAM PIARI SRIMATI (PLAINTIFF)

v

SRIMATI BRIJRANI AND OTHERS (DEFENDANTS)

1958

December '23

Will—*Maintenance—Charge on Property—Interpretation of the Will—Indian Succession Act,* 1925, *s* 177 *scope of*

Ram Sarup died in 1928 leaving some property and was succeeded by his minor son who also died six months later and his mother the plaintiff Ram Piari became the owner of half of item (b) and item (a) and item (c)

On 11th December 1924 Ram Piari surrendered all her rights in favour of her mother in law Srat Tulsha reserving to herself a right of residence and a sum of Rs 20 per month for her maintenance which was made a charge upon the property

On 19th February 1926 Tulsha executed a deed of relinquishment of the property surrendered by Ram Piari the plaintiff in favour of her husband Debi Din who became owner of it subject to the charge On 1st May 1930 Debi Din executed a will disposing of the entire property Debi Din died Shyam Behari also died in 1940 On 12th December 1946 Ram Piari filed a suit for Rs 1 900 at the rate of Rs 20 per mensem from 1st December 1938 to the date of the suit under the deed of relinquishment executed by her

Held that merely from the fact that a large amount was given for *guzara* to Ram Piari the plaintiff it cannot be inferred that it appears from the will that the legatee wanted to discharge the debt by giving the legacy

Pestonji Framji Mistri v *Framji Bajanji Billimoria* (1)

Special Appeal No 6 of 1953 from a decision of Kidwai, J, (Lucknow Bench), dated the 23rd September, 1958

The facts appear in the judgment

*Sitting at Lucknow

(1) (1910) 8 I L C 180

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RAM PIARI, SRIMATI v. SRIMATI BHIRANI

Niamatullah, R N Shukla, B L Shukla and Inayat ullah for the appellant

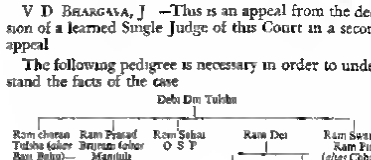
M L Tilhari for respondents nos 1 and 2

S C Das and *K S Verma* for all the respondents

The judgment of the Court was delivered by—

V D BHARGAVA, J —This is an appeal from the decision of a learned Single Judge of this Court in a second appeal

The following pedigree is necessary in order to understand the facts of the case



In November 1913 Ram Sahai having died previously, Debi Din and his three surviving sons Ram Charan, Ram Prasad and Ram Sarup divided the family property by a private partition Properties entered at (*a*) and (*b*) of List A attached to the plaint were allotted to Ram Charan and that at (*c*) was allotted to Ram Sarup

Ram Charan died in November 1917, and was succeeded by his widow Srimati Tulsha alias Bari Bahu who is defendant no 5 in this suit She transferred half of the property of item (*b*) and whole of item (*a*) to Ram Sarup purporting to do so under the oral will of her deceased husband The remaining half of item (*b*) she transferred by the same deed to Shiam Bihari and reserved to herself a maintenance allowance of Rs 15 p m which she made a charge upon all the properties transferred

Ram Sarup died in 1923 and was succeeded by his minor son, Shiam Manohar who also died six months later and, therefore, the plaintiff Srimati Ram Piari alias Chhoti Bahu became the owner of half of item (*b*) and

item (a) and item (c) By the deed Ex 3, dated the 15th December 1924 she surrendered all her rights in favour of her mother in law Srimati Tulsha reserving to herself a right of residence and a sum of Rs 20 per mensem for her maintenance This allowance was made a charge upon the property conveyed by her to her mother in law

On the 19th February 1926 Srimati Tulsha executed a deed Ex 4 relinquishing the property surrendered by Srimati Ram Piari the plaintiff, in favour of her husband Debi Din who became the owner of it subject to the charge

On the 1st May, 1930, Debi Din executed a will by which he made arrangements for the entire property then owned by him This will is Ex A 11 Therein he recites that there is no co-sharer in the property which he was bequeathing and since it was necessary to make arrangements of his property so that there may be no disputes after his death between his heirs and dependants he executed the deed Shortly after the execution of the will Debi Din died Shiam Bihari also died in 1940

On the 12th December 1946, Ram Piari instituted this suit out of which this special appeal arises for recovery of Rs 1 900 at the rate of Rs 20 per mensem from the 1st December 1938 to the date of suit under the deed of relinquishment executed by her She impleaded all the members of the family who were then alive and also the subsequent transferees but later on the two sons of Debi Din s daughter were exempted

According to the plaintiff the sum of Rs 20 per mensem continued to be a charge on the property which she conveyed to her mother in law and which later on was in turn first transferred to Debi Din and then to other members of the family and therefore she was entitled to a sum of Rs 20 per mensem which had not been paid to her

On behalf of the defendants it was contended that since Debi Din had made full provision for the maintenance of Srimati Ram Piari by giving her property

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V D BHARGAVA J

worth Rs 1 50,000 no charge remained on the property and since the plaintiff accepted the will she was not entitled to make any claim

The suit was dismissed by the trial court but the lower appellate court allowed the appeal and set aside the decree of the trial court and decreed the plaintiff s suit A learned Single Judge of this Court in second appeal again allowed the appeal set aside the decision of the lower appellate court and restored that of the trial court Against that decision this appeal has been filed

The sole question that arises in this appeal is whether by that will the charge was removed or not

Learned counsel for the appellant argues that as there is no mention of the charge in the will itself therefore it does not appear from the will that the legacy was meant as a satisfaction of that debt and therefore the creditor i e the plaintiff was entitled to the legacy as well as to the amount of the charge Reliance was placed by the learned counsel for the appellant on section 177 of the Indian Succession Act

Relying on the decision in *Venkatadri Appa Rao* v *Parthasarathi Appa Rao* (1), it was further argued that it should be the words of the will which should be interpreted and no extraneous evidence or circumstances should be taken into consideration in interpreting the will as the will was unambiguous and clear In the above case their Lordships of the Privy Council had relied among other English cases, on *Roddy* v *Fitzgerald* (2) wherein it was observed

> These rules are perfectly plain and clear The first duty of the court expounding the will is to ascertain what is the meaning of the words used by the testator It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the

1 (1924-25) L R 52 I A 214 2 (1859) 6 H L C 823 876

only and proper inquiry is, what is the meaning of that which he has actually written ? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used with the assistance of such parole evidence of the surrounding circumstances as is admissible to place the court in the position of the testator

It was contended by the learned counsel for the appellant that the learned Single Judge in this case has speculated as to what the testator is supposed to have intended to write and he has not interpreted the will as it should have been interpreted The point taken by the Learned Single Judge in consideration in deciding the case was that the testator intended to provide Shiam Bihari with a *guzara* and if this amount is also a charge on the property his *guzara* would be reduced practically to a nominal sum The second consideration was that since he had made full provision for maintenance in the will much better provision than what she had by means of a charge of Rs 20 therefore the testator must have been supposed to have given the legacy in lieu of the debt Learned counsel for the appellant argued that these are considerations which are speculative and beyond the power of the court to go into

Reliance has further been placed on a decision of the Bombay High Court in *Pestonji Framji Mistri v Framji Bejanji Billimoria* (1) where while interpreting section 177 which was then equivalent to section 164 of the Indian Succession Act it was laid down

> Where a testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred then the courts are precluded from going outside the actual words used by the testator and the effect seems to have been given to this principle by the language of section 164 of the Indian Succession Act'

(1) (1940) 8 I C 180

1958

RAM PIARI SHMATI v SHMATI BHAGAN

V D Bhargava J

It may be mentioned that section 177 is directly opposed to the principles of interpretation on this point under the English law where if one, being indebted to another in a sum of money, does by his will give a sum of money as great as or greater than, the debt without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt and the legacy While section 177 says that unless there is something in the will itself from which it appears that the legacy was meant as a satisfaction of the debt the creditor is entitled to the legacy as well as to the amount of the debt

In the present case it is true that the amount which has been given to Srimati Ram Piari is far greater an amount than the charge of Rs 20 per mensem, but from this if we are going to conclude thet it must be inferred, thet the testator did not intend to pay the debt also, it would be in effect giving effect to the principles of English law and not to the language of section 177

Pestonji Framji Mistri s case (1) was very much akin to the present case There the testator owed the legatee a sum of Rs 1,500 This sum was not carrying any interest and that in lieu of interest the legatee was residing in the house referred to in the will By the will the testator provided that his trustees were to give to his brother, Pestonji Framji Mistri Rs 1,500 namely fifteen hundred, without interest and they were to get him to vacate the place in his house which he then occupied Since there was no mention in the will that it was in lieu of the money which the testator owed to the legatee that he was giving this amount, though the amounts were identical and though the sum given to his brother was not carrying interest and it appeared that this amount was given in lieu of the vacation of the premises, yet the learned Single Judge held that since from the will itself it did not appear so it was not open to go beyond the will The Court was very reluctant in that case to give that decision So are we, in the present case Merely from the fact that a large amount was given for *guzara* we cannot infer that it appears from the will that the legatee wanted to discharge the debt by giving the legacy

(1) (1910) 8 I C 180

The appeal is therefore, allowed and the decree of the learned Single Judge is set aside and the plaintiff's suit is decreed but in the circumstances of the case the parties will bear their own costs throughout

Appeal allowed

1958

RAM PIARI, SHRIMATI v SHRIMATI BHIKHANI

CIVIL REVISION

*Before Mr Justice Srivastava and Mr Justice Nigam**

SHYAM KUMAR VERMA (PLAINTIFF)

v

S P MISRA (DEFENDANT)

1959

January 12

Sale and Hire purchase, distinction between

The plaintiff applicant and the defendant opposite parties agreed as follows

(1) That the defendant opposite parties have taken a new Hind Gents Cycle with all the accessories on hire at Rs 12 8 per month from the Alliance Agencies Lucknow

(2) That the hirers will pay the hire in advance within the first week of each month

(3) That if the hire is paid regularly without any break for a period of 12 months and when a total sum of Rs 148 has been paid the amount of hire paid will be treated as sale money and the hirer no 1 will automatically become the owner of the bicycle

The opposite parties took the cycle and paid a sum of Rs 72 8 in instalments The payment was then stopped and the plaintiff sued to recover Rs 272 4 as hire money for 23 months The defence was that the plaintiff could claim only the balance of the sum of Rs 148 which had been agreed to as the price of the cycle after deducting the payment already made This defence was accepted and the trial court decreed the suit for Rs 75 8 only A revision was filed against this order

Held that to determine whether the transaction amounts to a sale or a hire purchase agreement the test is whether a real option has been given to the alleged hirer to terminate the agreement at any time he likes

If such an option is given to him the transaction amounts to a hire purchase agreement If on the other hand there is no such option and the alleged hirer has to pay the entire amount,

*Sitting at Lucknow

1959

SHYAM KUMAR VERMA v. S P MEHRA

the transaction is a sale *Mahabali Prasad v H N Palmer* (1) *Bhimji N Dalal v Bombay Trust Corporation Ltd* (2) *The Central Finance and Housing Co , Ltd v Messrs The British Transport Co* (3) *Kasal Narayan v An Manala Laxmi Narsimman* (4) *Lee v Butler* (5) *Helby v Matheus* (6) relied on

Civil Revision No 49 of 1954 from an order of P V Singh, Judge Small Cause Court, Lucknow dated 5th November, 1953

The facts appear in the judgment

Ganesh Prasad for the applicant

Ramapati Pandey for the opposite party

The judgment of the Court was delivered by—

SRIVASTAVA, J —This is an application under section 25 of the Provincial Small Cause Courts Act It came up for hearing first before Mr Justice GUPTA, but he felt it desirable that it should be heard by a Division Bench It has consequently come up before us

The applicant and the opposite parties entered into an agreement on the 1st August, 1950, which provided as follows

> We the undersigned have this day taken a brand new Hind gents cycle complete with Dunlop tyres and tubes Dunlop saddle, original fittings, back carrier bell and gear cover on hire at Rs 12 8 per month from the Alliance Agencies, Lucknow
>
> It has been agreed as follows
>
> (1) That the hirers will pay the hire in advance within the first week of each month
>
> (2) That if the hire is paid regularly without any break for a period of 12 months, and when a total sum of Rs 148 has been paid, the amount of hire paid will be treated as sale money, and the hirer no 1 will automatically become the owner of the bicycle

In pursuance of the agreement the opposite parties took the cycle and thereafter paid a sum of Rs 72 8 in

1 A I R 1932 All 607
2 A I R 1939 Bom 306
3 1953 A L J 656
4 A I R 1955 Hyd 104
5 L R [1893] 2 Q B 318
6 L R [1895] A C 471

instalments He then stopped payment and the applicant sued to recover Rs 272 4 as hire money for 23 months

The suit was contested on the ground that the transaction entered into between the parties was not a hire agreement at all but was really a sale The defendants contended that the plaintiff could claim from them only the balance of the sum of Rs 148 which has been agreed upon as the price of the cycle after deducting the payments already made The learned Judge, Small Causes, accepted the defendants contention and declared the suit for Rs 75 8 only He also allowed proportionate costs

The applicant has filed this application in revision and the only contention put forward on his behalf is that the agreement between the parties had been wrongly interpreted by the learned Judge Small Causes, as an agreement of sale, and that he should have interpreted it as an agreement of hire purchase It is urged that as the opposite parties had not paid the entire sum agreed upon he could not claim to be the owner of the cycle and was liable to pay hire at the agreed rate of Rs 12 8 per month for the entire period during which he had retained the cycle in his possession The amount claimed on account of hire in respect of 23 months up to the date of this suit should therefore have been allowed to the plaintiff

The simple question that, therefore arises for decision is as to what is the correct interpretation of the agreement which we have already quoted in full

The distinction between an agreement of sale and an agreement for hire purchase has been brought out in a number of cases In this Court the question arose for the first time before a Division Bench in the case of *Mahabali Prasad v H N Palmer* (1) and it was laid down

> The difference between a contract of sale at a price payable by instalments and a contract of hire-purchase is that in the former the purchaser has no option to terminate the contract and return the

(1) A I R 1932 All 607

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Srivastava, J

chattel, whereas in the latter the hirer has In the former there is an agreement to purchase, whereas in the latter there is none In each case the substance of the transaction or the agreement must be looked at and not mere words

The agreement in that case related to coir matting valued at Rs 92 8 and the defendant had bound himself to pay to the plaintiff the sum of Rs 9 4 as monthly hire of the articles month by month in advance It was further agreed that if he had paid 10 months hire regularly on the due date he should become the purchaser of the coir matting without further payment If on the other hand he failed to pay regularly the plaintiff had the option to cancel the transaction and terminate the agreement The hirer had himself no such option The agreement was interpreted as one for sale of the coir matting and not for a hire purchase of the matting Reliance was placed in support of the view that was being taken on *Bhimji N Dalal* v *Bombay Trust Corporation Ltd* (1) *Lee* v *Butler* (2) and *Helby* v *Mathews* (3)

Subsequently another case came up before Mr Justice Bag and is reported in *The Central Finance & Housing Co , Ltd* v *Messrs The British Transport Co* (4)

After referring to the earlier cases on the point the learned Judge laid down

> In determining the question as to the nature of such (hire purchase) an agreement the Court should not be led away merely by the ostensible appearance given to the transaction by the words used by the parties but should make an attempt to go behind the phraseology for the purpose of ascertaining the real intention of the parties In other words, it is not the garb with which the parties choose to clothe the transaction that should guide the courts, but it is the spirit permeating the transaction that should be the determining factor of its real nature
>
> As the court tries to ascertain the real nature of the

1 A I R 1930 Bom 306
2 L R [1893] 2 Q B 318
3 L R [1895] A C 471
4 1953 A L J 656

> transaction, the court should take into consideration all the circumstances of the case It cannot be said that any one particular circumstance provides an acid test in the case Thus, for example, where it is apparent that as a result of the agreement, the transferee has eventually to pay the entire purchase price it may be a circumstance indicating that the transaction was meant to be a sale On the other hand if the transferee is given a right to terminate the agreement that may be an important circumstance indicating that the transaction was intended to be a hire purchase agreement

The same view appears to have been taken more recently by a Full Bench of the Hyderabad High Court in *Kassel Narayan v An Manala Laxmi Narsimman* (1) There it was observed as follows

> The leading test for determining whether an agreement is that of sale or of a hire purchase is to take into consideration the fact that whether an option to terminate the agreement has been reserved to the hirer And if such an option is given then the agreement is generally held to be of hire purchase In other words, where a person had a right to terminate the agreement for hire at his pleasure and is not bound to pay the value of the goods, it is a hire purchase agreement The option, however, must be real one and the hirer must not be compelled to the exercise of the option

We do not think it necessary to refer to any other cases on the point though there are many The test, as has been laid down, is clear It is, whether a real option has been given to the alleged hirer to terminate the agreement at any time he likes If such an option has been given to him the transaction must be interpreted as that of a hire purchase If, on the other hand there is no such option and the alleged hirer has to pay the entire amount the transaction must be held to be a sale

Now if we look to the agreement in the case before us, it is clear that in this case no option at all was given

1 A I R 1955 Hyd 104

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SHRIVASTAVA J.

to the defendants and they had to pay the hire regularly for a period of twelve months and it was only then that the transaction was to come to an end There is no provision in the agreement leaving it open to them to return the cycle at any time they liked and to discontinue paying the hire In the absence of such a clause in the agreement we think the agreement is capable of only one interpretation and that is that the cycle in question was being sold to the defendants and they were to pay the price of Rs 148 in twelve monthly instalments

It is interesting to note in this connection that in the agreement before us the plaintiff too did not reserve to himself the right to terminate the agreement and to take back the cycle at the time he liked There is no term providing for a right of seizure after forfeiting the payments already made as hire

We therefore think that the learned Small Cause Court Judge was perfectly justified in interpreting the agreement in the way in which he interpreted it The agreed price was admittedly Rs 148 and out of it Rs 72 8 had been paid in instalments The balance due to the plaintiff was the amount for which his suit was decreed On the agreement, as it stood, we think it was not open to the plaintiff to claim any excess amount

The decree passed by the learned Small Cause Court Judge was therefore quite correct and no interference appears to be called for The application in revision is, therefore dismissed with costs

Revision dismissed

APPELLATE CIVIL

Before the Honourable O H Mootham, Chief Justice and Mr Justice Dayal

BABU RAM (APPELLANT)

v

STATE OF UTTAR PRADESH AND OTHERS (RESPONDENTS)

1959 January 19

Pradhan of Gaon Sabha—Age of as recorded in the family or adult register—Whether final and conclusive and not liable to be reopened in election petition—United Provinces Panchayat Raj Act 1947 ss 5B and 12 G—Panchayat Raj Rules, r 5(2)

The expression used in rule 5(2) of the Panchayat Raj Rules is that the register so re published shall be final and not it need be noticed final and conclusive which has been used in other parts and for other purposes in the Act The finality attached to the register relates to and must be confined to proceedings anterior to rule 5(2) dealing with the general preparation of the register of members of the Sabha and the entries therein are open to revision or correction by prescribed authorities in appropriate cases such as those under rules 6 to 11

The Election Tribunal is therefore quite competent to go behind the relevant entry in the register and to find on the evidence adduced the actual age of the person elected as Pradhan

Quaere Whether the question of a person being an adult and entitled to vote in the election of the Pradhan may be agitated in the election petition notwithstanding the fact that he was so recorded in the adult register?

Dudhnath Prasad v Mool Chand (1) explained The observations of OAK, J in *Ram Singh v Sub Divisional Officer Chhatar* (2) and the validity of rule 19 B leading to the negative questioned

The Full Bench decision in *Ghulam Mohiuddin v The Election Tribunal of Town Area Sahit* (3) distinguished on the ground that the franchise in question under the Town Areas Act was conferred on persons whose names had been entered in the electoral rolls whereas that under the Panchayat Raj Act was available to adults only

Special Appeal No 349 of 1958 from a decision of Tandon, J, in Civil Miscellaneous Writ No 1988 of 1956, dated 17th March, 1958

(1) A I R 1958 All 7 (2) 1958 A L J 203
(3) I L R [1959] 1 All 157

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BABU RAM
v
STATE OF
UTTAR
PRADESH

The facts appear in the judgment

Surajpath Singh and *R P Singh* for the appellant

A P Gupta for the respondents

The judgment of the Court was delivered by—

DAYAL, J —This is a special appeal against an order of Mr Justice TANDON, dismissing a petition under Article 226 of the Constitution

Babu Ram the appellant, was declared elected Pradhan of Gram Sabha Rutha as a result of an election held in 1955 Himmat Gir, respondent no 3 filed an election petition before the Sub Divisional Officer and challenged the appellant s election on the ground that he was less than thirty years of age at the time of his election to the office of Pradhan The Sub Divisional Officer found on the basis of evidence before him that the appellant was actually less than thirty years of age at the time of his nomination and consequently allowed the election petition set aside the election of the appellant and declared Himmat Gir to be the duly elected Pradhan of village Rutha The appellant then filed the writ petition and prayed for the quashing of this order of the Sub Divisional Officer

The ground, urged against the correctness of the order of the Sub Divisional Officer were firstly that no question of improper acceptance or rejection of a nomination arose when no objection to the nomination of the appellant was taken at the time of the scrutiny of nomination papers and secondly that the question of the appellant being not qualified to be chosen a Pradhan on account of his being less than thirty years of age had to be decided by the prescribed authority, that is the Tahsildar in view of the provisions of section 6 A of the U P Panchayat Raj Act 1947, read with rule 14 of the U P Panchayat Raj Rules The other grounds mentioned in the petition dealt with the correctness of the entries relied upon by the Sub Divisional Officer or the admissibility in evidence of the documents considered by the Sub Divisional Officer They also challenged the propriety of declaring Himmat Gir to be the duly elected candidate They did not, however, include the ground

that the Sub Divisional Officer had to accept the record of age in the village family register as correct—a point which was raised before the learned Judge and which alone had been raised by the learned counsel for the appellant before us

The learned Judge held that Himmat Gir had challenged the election of the appellant not on the ground of the improper acceptance of his nomination but on the ground that there had been a gross failure to comply with the provision of the Act inasmuch as a person less than thirty years of age had been allowed to be chosen Pradhan of the Gram Sabha in contravention of the provisions of section 5 B of the Act He repelled the contentions that the Sub Divisional Officer was bound to accept the entry about age in the family register as correct and that the Sub Divisional Officer was not competent to decide an objection coming within the purview of section 6 A of the Act

The question whether the Sub Divisional Officer can decide on an election petition objection which would otherwise come under section 6 A of the Act has been recently decided by this Court in *Sri Amar Nath Singh* v *Sub Divisional Officer, Gyanpur,* (1) It has been held that the Sub Divisional Officer is competent to decide such objections This question was not, therefore, pressed at the hearing of the appeal

The first point argued for the appellant is that the entries about age in the family register must be accepted as correct by the Sub-Divisional Officer in view of the fact that the rule 5 (2) of the Panchayat Raj Rules gives a finality to the register republished after the amendments made in accordance with sub rule (1) We do not agree with this contention

Section 5 of the Act provides that Gaon Sabha shall consist of all adults ordinarily resident within the area for which it is established and lays down certain disqualifications for membership of the Gaon Sabha Section 5 A lays down disqualifications for holding office under the Gaon Sabha or the Nyaya Panchayat Section 5 B

(1) I L R [1959] 2 All 229

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is A member of a Gaon Sabha shall not be qualified to be chosen as Pradhan unless he is not less than 30 years of age

Section 9 of the Act provides for the preparation of the register of members and is

> On the establishment of a Gaon Sabha the prescribed authority shall cause to be prepared a register in the prescribed form of all persons ordinarily residing within the jurisdiction of such Gaon Sabha and such register shall, among other things contain the names of every person entitled under section 5 to be a member of the Gaon Sabha on the date of its establishment The register so prepared shall be revised at least once a year in the manner prescribed

Chapter I B of the Panchayat Raj Rules deals with the preparation of the register of members, its periodical revisions and its custody and preservation According to rule 4 the register is to be prepared in accordance with the provisions of the Act the rules contained in that Chapter and the directions issued by the Director of Panchayats It is to be a register of the members of the Sabha

Rule 4 A prescribes the form of the register and sub rule (1) says that the register will be prepared in Form A According to sub rule (2) the register is to be in two parts Part I called the family register, is to contain the names and particulars of all persons family wise ordinarily residing in each village included in the Sabha and Part II called the adult register is to contain the names and particulars only of those adults who are entitled to be members of the Sabha under section 5 of the Act, that is to say adults who are not disqualified i e, who are not citizens of India or are of unsound mind and stand so declared by a competent court Part I of Form A has twelve columns The eighth column is for noting date of birth if known or probable date of birth of the person concerned Part II has nine columns The seventh column is for date of birth It is clear that the entries in Part II are made on the basis of the entries in Part I The names of such persons in Part I are

taken over to Part II as according to the known or probable date of birth have attained the age of 21 years at the time of the preparation of the register

The draft register prepared by the Secretary of the Sabha is published in view of rule 4 F Claims and objections to the entries in the register are filed in view of rule 4 H and are disposed of in accordance with the provisions of rule 4 J and rule 6 All these claims and objections except those which raise any question of the nature referred to in section 6 A of the Act are disposed of by the Panchayat Inspector on summary enquiry His orders are subject to revision by the Tahsildar whose decision is final A copy of the Tehsildar s decision is forwarded to the Secretary of the Sabha who in view of sub-rule (1) of rule 5 makes the necessary amendments in the draft register of members This amended register of members is then re-published in view of sub rule (2) of rule 5, and it is this re published register which sub-rule (2) makes final The contention for the appellant is that the finality given by this rule to the register is such a finality that the correctness of tha entries therein are not to be questioned by the Sub Divisional Officer as an Election Tribunal

The finality given to the register under sub rule (2) of rule 5 cannot be a finality of the kind suggested for the appellant This is clear from the other rules to be referred shortly If sub-rule (2) of rule 5 gave such a finality to the entries in the register, the rule will be *ultra vires* of the State Government Section 110 of the Act empowers the State Government to make rules consistent with the Act to carry out the purposes of the Act It is clear from section 4 of the Act that only adults can be members of the Gaon Sabha Persons who have not attained the age of 21 years are not adults in view of the definition of the word adult in clause (*b*) of section 2 of the Act If the register of members has such a finality as urged for the appellant in view of sub rule (2) of rule 5, a person less than twenty-one years of age can be a member of the Sabha and a person less than thirty years of age can be chosen Pradhan if their names have been recorded in the adult register by mistake The rule will then not be helpful in carrying out the purposes of

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the Act but will be conducive to the contravention of the provisions of Act It cannot therefore be a valid rule Such an interpretation therefore is not to be given to this rule unless the language of the rule forces it In that case as already indicated the rule itself would be bad and would not affect the competency of the Sub-Divisional Officer to look into the contention for the defeated candidate that the person elected for the post of Pradhan was actually less than thirty years of age

The relevant expression in sub rule (2) of rule 5 is The register so re published shall be final It is not that the register so re published shall be final and conclusive That would have been a stronger expression though even then it would be open to argument whether that would give conclusiveness to the entries in the register In this connection reference may be made to sections 10 12 C and 12 D of the Act Section 10 makes the decision of the State Government on any dispute relating to interpretation of any provision of the Act final and conclusive Sub section (6) of section 12 C makes the order of the prescribed authority on an election petition final and conclusive and further provides that it shall not be questioned in any civil court Similarly section 12 D makes the decision of the prescribed authority in any dispute relating to the election of Up Pradhan final and conclusive and also provides that it shall not be questioned in any civil court It is to be noticed that no such expression about conclusiveness or immunity from being questioned in a civil court is used with reference to the decision of the Tehsildar in sub rule (4) of rule 4-J or with reference to the re published register in sub rule (2) of rule 5

Provisions in other Acts, with respect to certain orders being final, have been interpreted to mean that those orders are not subject to any appeal Those orders can be subject of revision by a superior authority It follows that the expression The register so re published shall be final simply means that the entries made after the amendments as a result of the orders of the competent authority on the claims and objections will be no more open to further claims for entries or objections requiring

the deletion of entries in that register The finality attaches to the form of the register and not to the correctness of the entries made therein The entries can be questioned in an appropriate manner on an appropriate occasion and can be disposed of by the authority competent to deal with the objections concerning those entries

Section 9 of the Act provides for the revision of the register at least once a year and thus implies that it can be revised more frequently

Rule 6 of the Panchayat Raj Rules lays down the procedure for the decision of such claims and objections which must any question of the nature referred to in section 6 A of the Act It may be noticed at once that this rule follows rule 5 and there is nothing in rule 5 which provides for amendment of the draft register on the basis of the decision on such claims and objections On the other hand sub rule (4) of rule 6 provides for a copy of the order passed by the Tehsildar under sub rule (1) as modified in appeal if any under sub rule (3) to be forwarded to the Secretary of the Sabha and to the Panchayat Inspector Rule 7 provides that on receipt of such a copy of the order the Secretary of the Sabha shall if necessary strike off the name of the person concerned from the register of members and shall send an intimation thereof to the person concerned This rule itself therefore indicates that the entries in the re published register are not final and conclusive They can be struck off and we think therefore their correctness can also be questioned

Rule 8 provides for the making of necessary changes in the family register consequent on births and deaths, if any

Rule 10 provides for special revision of the register The Director of Panchayats for reasons to be recorded in writing can direct the revision of a register of members or a part thereof

Rule 10-A empowers the Panchayat Inspector to order the correction of any existing entry in the register of members Of course, his orders are subject to the direction issued by the Director of Panchayats

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Rule 11 gives a right to any person whose name is not included in the register of members to apply to the Panchayat Inspector for the inclusion of his name and the Panchayat Inspector if satisfied after such enquiry as he thinks fit about his right to be registered can direct that his name be included in the register

Rule 14 deals with references under section 6 A pertaining to disqualifications when a question referred to in section 6 A of the Act is raised otherwise than in a claim or objection Such a question is also decided in the first instance by the Tehsildar, whose orders are subject to appeal to the Sub Divisional Officer Sub rule (7) of this rule provides for the Secretary of the Sabha to strike off if necessary the name of the person concerned from the adult register

All these various rules therefore, make it clear that the entries in the re published register are open to revision, to being struck off and to being added to and therefore lead to the conclusion that the entries in the there published register are not final in the sense that their correctness must be accepted even when challenged

An entry with respect to age in the register of members cannot be taken to be correct when the very basis of it can be of doubtful accuracy Column 8 Part I of Form A authorizes the entry of the date of birth even when it is not correctly known When a probable date of birth is noted, it should be open to a person to show that what was alleged to be a known date or to be a probable date was not really the correct date of birth of the person concerned A similar inference is also to be drawn from the fact that even the claims and objections to the entries in the draft register are disposed of as a result of a summary enquiry by the Panchayat Inspector

We are therefore of opinion that the entries in the register of members are not conclusive and that the Sub-Divisional Officer is competent to decide the question about the correct age of the person elected and is not bound to accept the entries in the register of members as correct

Secondly, it is urged for the appellant that the mere fact that the appellant though less than thirty years of

age has been elected Pradhan did not amount to the result of the election being materially affected by gross failure to comply with the provisions of the Act or the rules framed thereunder The contention is that the Returning Officer has not failed to comply with any provision of the Act and that he has followed the correct procedure laid down by the Act and the rules It just happens that a person less than thirty years of age was nominated and was elected by the majority of voters Support for this view is sought from the case of *Dudhnath Prasad v Mulchand* (1) wherein DESAI, J mentioned the various submissions made in support of such a contention at page 15 and then said as follows

> There is much force in all these arguments advanced on behalf of the petitioner but the opposite view has been taken by the Supreme Court in the case of *Durga Shanker* (2)
>
> It was held there that if a person constitutionally disqualified is elected it is a case of non compliance with the provisions of the Constitution On this reasoning allowing the petitioner if he was under age to be elected as a Pradhan would amount to non compliance with the provisions of section 5 B of the Act

The case does not support the appellant The paragraphs on which reliance is placed are not the expressions of opinion of DESAI, J but are the record of the contentions raised before him

Reliance is also placed on the case of *Ram Singh v Sub Divisional Officer, Chunar* (2) wherein OAK, J observed

> The combined effect of section 5 and rule 19 B is this A person, whose name is recorded in the Adult Register is entitled to vote even if the name is wrongly recorded in the Adult Register The Returning Officer and the Election Tribunal have to assume that that person is entitled to vote

The question for decision in that case was different from the question before us An election petition was dismissed on the ground that the defeated candidate had

(1) A I R 1958 All 7 (3) 1958 A L J 203
(2) A I R 1954 S C 520

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Dayal, J

failed to prove that six persons who had voted for the successful candidate were minors The defeated candidate then filed the writ petition, and on the assumption that those six persons were minors, OAK, J held that if their names were on the register of electors they were entitled to vote With respect, it can be said that this question did not really arise in the case when on a question of fact the petitioner had failed before the Election Tribunal The question was really decided on the basis of rule 19 B which gave a right of vote to a person whose name was entered in the adult register The validity of this rule it may noted is open to question in view of section 11 B of the Act which provides that the Pradhan shall be elected by the members of the Gaon Sabha which according to section 5 can be adults only

Reliance is further placed on the Full Bench decision in *Ghulam Mohuddin* v *The Election Tribunal for Town Area Sakit* (1) That case did not relate to the election of a Pradhan of a Village Panchayat but related to the election of a Chairman of a Town Area Committee, and the question to be decided was whether the Election Tribunal could look into the contention that the names of certain persons should not have found a place in the electoral rolls prepared for certain wards in the Town Area on the grounds that some of them were minors and that some did not reside within the wards concerned Sub section (2) of section 8 A of the U P Town Area Act 1914 provides that the Chairman is to be elected by the electors of the Town Area The electors according to rule 5 of the Uttar Pradesh Town Areas (Conduct of Election of Chairman) Rules 1958 are the electors entered in the electoral rolls of the wards of the Town Area Section 6 F of the Act gave the right of vote to a person who was for the time being entered in the electoral roll of any ward It was in view of these provisions that the Full Bench held that it was not open to the Election Tribunal to determine whether the persons whose names were entered in the electoral roll possessed the necessary qualifications for the registration of their names in the electoral roll and that the facts that a

(1) I.L.R. [1959] 1 All 157

person had not attained the age of twenty-one years or did not reside within a particular ward did not amount to disqualification In the present case the question is whether the Election Tribunal can enter into the correctness of the entry in the adult register about the age of the person elected Pradhan There is no provision in the Act that a person whose name is entered in the adult register and who is therein shown as having attained the age of thirty years can be elected Pradhan It follows therefore, that the mere entry in the adult register that a person is thirty years of age cannot make that person eligible for election to the office of Pradhan Only the person satisfying the requirements of section 5 B of the Panchayat Raj Act is eligible for election to the office of Pradhan and therefore it is the duty of the Election Tribunal to go behind the entries in the adult register and to find on the evidence produced whether the person elected was or was not less than thirty years of age This Full Bench, therefore does not help the appellant

For the reasons stated above we are of opinion that this appeal should fail We accordingly dismiss it with costs

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice Mukerji and Mr Justice Tandon**

1959

February 11

JAWALA PRASAD AND OTHERS (DEFENDANTS)

v

SRI SUMIRAN AND ANOTHER (PLAINTIFFS)

Landlord and Tenant—*Suit for possession—Possession under the compromise till 30th June 1952—Adhivasi rights scope and ejectment of—U P Zamindari Abolition and Land Reforms Act 1950 s 20 (a) (ii) 209 231 and 234 scope of*

S was a hereditary tenant of certain plots of land in a village On 1st July 1942 *S* sublet these plots to J P and others who were defendants to the suit *S* was succeeded by his two sons S I and P who filed a suit for ejectment and declaration of rights

Sitting at Lucknow

1959

JWALA PRASAD v. SRI SIMRAN

in the above lands against the defendants On 18th March 1948 there was a compromise between the parties under which the defendants were to pay Rs 30 per month as rent up to 30th June 1952 and the defendants were permitted to continue as sub-tenants up to 30th June 1952 when they were to give up possession of the plots to *S* I and *P* The defendants did not give possession and after the expiry of 30th June 1952 *S* I and *P* the plaintiffs filed a suit for possession against the defendant who pleaded that they were *adhivasis* under s 20 of the Zamindari Abolition and Land Reforms Act and were not liable to ejectment This is a Second Appeal by the defendants

Held (i) that the defendants acquired *adhivasi* rights under s 20 (*a*) (ii) of the Act and after acquiring *adhivasi* rights they were entitled to retain possession of the land in respect of which they acquired these rights

(ii) that the defendants acquired *adhivasi* rights independently of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Zamindari Abolition and Land Reforms Act Their rights are not subject to anything which they had said or undertaken under the compromise

(iii) that s 209 of the Act did not apply as the defendants were persons who are in possession of the property under the provisions of the Statute

(iv) that s 234 of the Act is inapplicable as the provisions laid down for ejectment do not apply to this case

(v) that the grounds on which the ejectment of an *adhivasi* can be sought have got to be at any rate *ejusdem generies* the grounds mentioned in s 234 of the Act and the suit of the plaintiffs is liable to be dismissed

Second Appeal no 427 of 1954 against the decree of G M Frank Agarwal District Judge of Gonda dated 11th October, 1954

The facts appear in the judgment

Hyder Husain for the appellant

H D Srivastava for the respondent

The judgment of the Court was delivered by—

MUKERJI, J —This is a Second appeal arising out of a suit for ejectment under section 209 of Act I of 1951, viz the U P Zamindari Abolition and Land Reforms

Act The circumstances which gave rise to the suit were these

One Suchit was the hereditary tenant of certain plots of land On the 1st of July 1942 Suchit sublet these plots to Jwala Prasad and others who were the defendants to the suit Some years after subletting Suchit died, and he was succeeded by Sumiran and Puran in respect of the lands Sumiran and Puran filed a suit praying for a declaration of their rights in the land for ejectment of the defendants and for delivery of possession being given to them of the lands from which the defendants were to be ejected

On the 13th March 1948 there was a compromise in the aforementioned suit and under the compromise the defendants were permitted to continue as sub-tenants of the land in suit till the end of 1359 Fasli i e up to the 30th June 1952 The defendants under the compromise were to pay Rs 30 per annum as rent and after that period, viz , after the 30th June 1952, they were to give up or relinquish possession in favour of the tenants in chief the plaintiffs of that suit

The defendants did not give up possession of the lands in suit after the expiry of the 30th June 1952 They continued in possession and the desire of the plaintiffs to get back possession from them voluntarily proved of no avail Thereafter the plaintiffs filed the present suit out of which the present appeal has arisen This suit was filed by Sumiran and Puran against Jwala Prasad Shyam Sunder Jagannath and Dava Shankar Pradhan of Gram Sabha of Udaipur The suit was one, as we have said under section 209 of the Zamindari Abolition and Land Reforms Act and was filed on the 2nd January, 1958

The defence of Jwala Prasad and his co-defendants was that they had prescribed *adhiyari* rights under section 20 of the Zamindari Abolition and Land Reforms Act and therefore, they were not liable to ejectment by enforcing a term of the compromise which had been entered into before the Zamindari Abolition and Land Reforms Act came into being namely the compromise dated the 13th March, 1948

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JWALA PRASAD v. SRI SURIRAM

Mahesp, J

The learned Munsif of Tarabganj, Gonda who tried the suit held that the defendants had prescribed to themselves the rights of an *adhiwasi* under section 20 of Act I of 1951 but even so he held that because of the provisions of section 231 of that Act the defendants were liable to be ejected because one of the liabilities which they had undertaken was the liability to go out of possession of the lands on the 30th June 1952 in short, what the trial court held was that since section 231 of the Zamindari Abolition and Land Reforms Act recognized the liabilities which a person prior to his becoming an *adhiwasi*, undertook and since further the defendants had under the compromise undertaken to go out of possession after the 30th June 1952 therefore that liability of theirs could be enforced by the suit

There was an appeal and the lower appellate court more or less took the same view which the trial court had taken and affirmed the decree for ejectment which had been passed by the trial court

The defendants therefore have come up in Second appeal to this Court The Second appeal originally came before a learned Single Judge who referred it for decision to a Bench

The questions that arise for determination in this appeal may be stated thus

(1) Did the defendants acquire the rights of an *adhiwasi* under section 20 of the Zamindari Abolition and Land Reforms Act and if they did under which part of the section they acquired such rights?

(2) Whether after having acquired the rights of an *adhiwasi* if they did so by virtue of section 20 of the Act could they be ejected from the lands in respect of which they acquired *adhiwasi* rights because of the compromise entered into by them on the 13th March, 1948?

(3) Whether the words the liabilities mentioned in section 231 of the Zamindari Abolition and Land Reforms Act referred to the liabilities of the type under which could come the liability which

was undertaken by the defendants by the compromise of March 1948?

(4) Could it be said that the defendants acquired the rights of an *adhivasi* on the basis of the compromise or did they acquire those rights independently of that compromise and if they acquired the rights of an *adhivasi* independently of that compromise whether any obligation or any liability incurred under that compromise could or could not be enforced by virtue of the provisions of section 231 of the Act?

(5) Whether an *adhivasi* can be ejected on any other grounds including a contractual obligation made by him which did not quite fall within the grounds for ejectment mentioned in section 234 of the Act?

As we have noticed earlier, the defendants were sub tenants and as such they acquired *adhivasi* rights under the provisions of section 20 (*a*) (ii) of the Zamindari Abolition and Land Reforms Act. It was conceded by counsel on both sides and, indeed it was accepted by the courts below too that the defendants did acquire the status of an *adhivasi*. What however was not correctly stated by the lower appellate court was the provision under which that right was acquired. As we have said in our view the defendants acquired *adhivasi* rights under section 20 (*a*) (ii) and after acquiring *adhivasi* rights they were entitled to retain possession of the land in respect of which they acquired those rights.

Section 231 of the Act mentions the rights of *adhivasis*. This section is in these words:

> 231. *Rights of an adhivasi*.—(1) Except as provided in sections 233, 234 and 237 and subject to his paying the rent an *adhivasi* shall continue to have all the rights and the liabilities which he possessed or was subject to in respect of the land on the date immediately preceding the date of vesting:
>
> Provided that notwithstanding anything contained in any contract or other engagement the rent payable by the *adhivasi* shall not be varied except as permitted by this Act.

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JWALA PRASAD v. SAI SUBBIAH

Mukerji, J.

(2) When an *adhwasi* dies his interest in the holding shall in the matter of devolution be governed by the provisions contained in sections 171 to 175

The provisions of the aforequoted section 231 clearly indicate that the *adhwasi* is to continue to have all the rights and liabilities which he possessed or to which he was subject in respect of the land on the date immediately preceding the date of vesting The question therefore that falls for determination under the circumstances of this case is whether the defendants could be said to have been under a *liability* as contemplated under section 231 of going out of possession because they had under the compromise undertaken to go out of possession voluntarily after the 30th June 1952 in short the question is whether that agreement in the compromise could be termed as one of the liabilities to which the defendants were subject to immediately preceding the date of vesting If the defendants could be said to have acquired *adhwasi* rights by virtue of the compromise, then there could be no difficulty in saying that they were subject to the liabilities which they had undertaken under that compromise, if there was any liability under the terms of the compromise but if the acquisition of their right as *adhwasi* was independent of and *aliunde* the compromise then in our view it could not be contended reasonably that the defendants rights as *adhwasi* were subject to any liabilities they had undertaken under the compromise By the compromise the defendants did not acquire the status of a sub tenant that status they enjoyed prior to the compromise the compromise only recognized that status so that immediately preceding the date of vesting they were sub-tenants Under the compromise the defendants agreed to give up possession after the 30th June 1952 but no specific date was fixed for their doing so All that was recognized under the compromise was that the defendants were to continue to enjoy the status of a sub tenant on payment of rent from 1355 to the end of 1359 Fasli Immediately before the date of vesting the defendants were not under an obligation to give up possession so that under the compromise they could not

be said validly to have undertaken any obligation to give up their status immediately prior to the date of vesting so that under the compromise there was no obligation which could be set up against them

Sri Hargovind Dayal Srivastava, appearing on behalf of the respondents strenuously contended that the words the liabilities used in section 231 referred to every kind of liability which was undertaken by the erstwhile sub-tenant who became an *adhivasi* subsequently his contention was that it certainly included all contractual obligations to which the erstwhile sub tenant was subject. It is not necessary for our purposes to express an opinion as to whether or not the words the liabilities mentioned in section 231 were or were not wide enough under certain circumstances to include contractual obligations and some liabilities in the nature of contractual obligations, for in the present case we are concerned with a particular type of contractual obligation which was being attempted to be enforced against the defendants The question therefore is whether the particular obligation which had been undertaken by the defendants in the deed of compromise namely to give up possession voluntarily after the close of 1359 Fasli, was such a liability as could be enforced against them

Section 231 speaks of rights and liabilities which the *adhivasi* possessed or was subject to in respect of the land on the date immediately preceding the date of vesting Can it be therefore said that the obligation which the defendants took upon themselves to voluntarily leave the land was in the nature of rights and liabilities which they possessed in respect of the land on the date immediately preceding the date of vesting ? We do not think it was, for as we see the position we see it to be that immediately after the midnight of the 30th June, 1952, by the coming into force of the Zamindari Abolition and Land Reforms Act and on the making of the vesting order the defendants acquired certain statutory rights These rights were acquired independently of the compromise of the 13th March 1948 The fact that the defendants enjoyed the status of sub tenants even under the compromise did not make the terms of the compromise any of the rights or liabilities which they

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JWALA PRASAD v. SRI SURDRAN.

Mukerji J.

possessed immediately preceding the date of vesting as sub tenants We are of the opinion that the defendants acquired *adhiwasi* rights independently of the compromise and the terms of the compromise did not in any manner affect the rights acquired by them under the Zamindari Abolition and Land Reforms Act Their rights could not therefore be said to be subject to any thing which they had said or undertaken under the compromise

The question that now arises for determination is that if the defendants were not bound by any declaration which they made in the compromise as a liability under the provisions of section 231 could they be ejected under the provisions of section 209 of the Act ? Section 209 of the Act confers the rights to eject persons occupying land without any title The defendants on what we have said above could not be said to have been occupying land without any title They acquired an interest in the land—an interest created in their favour by the Statute namely they acquired the status of an *adhiwasi* which conferred on them rights and liabilities mentioned in section 231 of the Zamindari Abolition and Land Reforms Act Therefore they could not possibly be deemed to have been persons taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force They were retaining possession because under the provisions of section 20 they had prescribed to themselves the character and the status of an *adhiwasi* and as such under that very section they were entitled to take or retain possession of the land in respect of which they acquired such rights Section 231 guarantees the continuance of the rights which an *adhiwasi* acquires subject of course to the provisions of sections 233 234 and 237 of the Act Sections 233 and 237 are not really pertinent for our present purposes but section 234 is in so far as this section prescribes the grounds on which an *adhiwasi* can be ejected Section 234 is in these words

234 *Ejectment of adhiwasi*—Without prejudice to the provisions of section 237 an *adhiwasi* shall be liable to ejectment from the land held by him—

(*a*) on the ground that he is in arrears of rent,

(b) on the ground that he has made any transfer of his holding or part thereof, or

(c) for using the land for any purpose not connected with agriculture horticulture or animal husbandry which includes pisciculture and poultry farming

and the provisions of Chapter VIII relating to the procedure and forum relating to suits and applications for ejectment on any of the grounds aforesaid shall *mutatis mutandis*, apply as if the *adhivasi* were an *asami*

The provisions of the aforequoted section 234 therefore indicate that an *adhivasi* was liable to ejectment on certain grounds *Sri Hargovind Dayal Srivastava* contended that the grounds mentioned in section 234 were not exhaustive It may be that but nevertheless in our opinion the grounds on which the ejectment of an *adhivasi* can be sought have got to be at any rate *ejusdem generis* the grounds mentioned in section 234 The opening words in section 231 are except as provided in sections 233 234 and 237 which give clear indication of the fact that the ejectment of an *adhivasi* could take place only under section 234 In this connection it may be noticed that the entire object of the legislature in enacting the U P Zamindari Abolition and Land Reforms Act and the other pieces of connected or similar legislation was to confer on tenants rights which could not easily be defeated That being the clear intention and policy underlying the legislation it would be in our view incorrect to interpret the section in such terms unless the language of the section forced such interpretation, which would defeat or materially affect the objects underlying the legislation

For the reasons given above we are of the opinion that this second appeal must succeed We accordingly allow this appeal, set aside the decrees of the courts below, and dismiss the plaintiffs suit Under the circumstances of this case, however we are of the opinion that the parties must bear their own costs of the litigation throughout

Appeal allowed

APPELLATE CIVIL

*Before Mr Justice N U Beg and Mr Justice V D Bhargava**

1959

March 11

NAWAB SYED HASAN ALI KHAN (PLAINTIFF)

v

NAWAB ASKARI BEGAM *alias* NAWAB ARA BEGAM (DEFENDANT)

Arbitration—*Award—Arbitrator in the alternative—Arbitration Act* 1940 *s* 39 *scope of—Arbitration Act,* 1940 *s* 5—*Date of entering on reference scope of*

On 23rd September 1948 Hasan Ali Khan and Askari Begum entered into an agreement by which they appointed Sajjad Ali Khan as arbitrator to decide on the dispute between them regarding some moveable property left by their mother The deed of agreement also provided that in case Sajjad Ali Khan refused to act as an arbitrator Maulana Ibne Hasan should act as an arbitrator On 19th October 1948 Sajjad Ali Khan entered on reference He took certain proceedings in January 1949 but later on he refused to act as an arbitrator On 19th January 1949 Maulana Ibne Hasan entered on reference and declared his award on 18th May 1949 On 2nd June 1949 an application for filing the award was filed On 23rd August, 1955 objections to the award were filed On 2nd March 1956 the trial court rejected the application for the filing of the award holding that the award was given beyond time An appeal was filed under s 39 of the Arbitration Act.

Held that the order of the trial court amounts to an order setting aside the award and is appealable

Jogdish Mahton v Sunder Mahton (1) relied on

Held also that the date of entering on the reference i e 19th January 1949 should be the date on which the arbitrator who was to act in the alternative entered on the reference and hence the award given on 18th May 1949 is within time

First Appeal From Order No 23 of 1956 against the decree of B C Jauhari Civil Judge, Mohanlalganj, at Lucknow, dated the 2nd March, 1956

The facts appear in the judgment

Nazirudden for the appellant

M P Srivastava for the respondent

Sitting at Lucknow

1 A I R 1949 Pat 393

The judgment of the Court was delivered by—

BEG, J.—This first appeal arises out of an application given under section 14 of the Arbitration Act. It appears that on the 23rd September 1948, parties executed a deed of agreement, by which they appointed Nawab Sajjad Ali Khan as arbitrator to decide the dispute between them regarding the moveable property left by Zohra Begam deceased, the mother of the parties. There was also a provision in this agreement that in case Nawab Sajjad Ali Khan refused to act as an arbitrator, Maulana Ibne Hasan should act as an arbitrator. Under the aforesaid agreement Nawab Sajjad Ali Khan entered on reference on the 19th of October, 1948. He took the necessary proceedings as an arbitrator under the Arbitration Act. Some time in January, 1949, however, Nawab Sajjad Ali Khan refused to act as an arbitrator. Under the terms of the agreement therefore, Maulana Ibne Hasan who was to act as an arbitrator in case of the refusal of Nawab Sajjad Ali Khan, became the proper person to act as an arbitrator. Accordingly Maulana Ibne Hasan entered on reference on the 19th of January 1949. He delivered his award on the 18th May 1949 i.e. within four months of his entering on reference to arbitration. On the 2nd June, 1949 an application was given under the Arbitration Act for the filing of the award given by Maulana Ibne Hasan. On the 23rd August 1955 objections to this award were filed on behalf of the respondent. On the 2nd March 1956 after hearing the arguments of the parties the learned Civil Judge of Mohanlalganj rejected the application for the filing of the award on the ground that the award was given beyond time. Aggrieved with the said order the appellant has filed this appeal in the High Court.

Before the arguments started the learned counsel for the respondent raised a preliminary objection to the hearing of the appeal. He argued that the present appeal is not maintainable under section 39 of the Arbitration Act. Section 39 of the Arbitration Act provides for appeals against orders setting aside or refusing to set aside an award.

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NAWAB SYED HASAN ALI KHAN v NAWAB ASKARI BEGAM alias NAWAB ARA BEGAM

Beg J

Having heard learned counsel for the respondent, we are of opinion that the order in the present case is an appealable one It is admitted that an application under section 14 of the Arbitration Act was given in the trial court It is further admitted that the award was filed in court as a result of that application, and objections to the said award were invited Thereafter the respondent filed objections and the court adjudicated on those objections after going into the matter The court finally dismissed the application for filing the award. The order of the trial court, therefore amounts to an order setting aside the award and would, therefore, be appealable Reference in this connexion may be made to a decision of the Patna High Court in *Jagdish Mahton v Sunder Mahton* (1)

On merits also we are of opinion that there is force in this appeal The view of the trial court that the award was given beyond time appears to us to be erroneous In this connexion reference might be made to section 3 of the Arbitration Act which provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference Paragraph 3 of the First Schedule runs as follows

> 3 The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow'

There being nothing contrary to the above provision in the agreement the said provision will apply to the present case The award would, therefore, be within time if the arbitrator who entered on the reference has made the award within four months of the date of his entering on the reference Maulana Ibne Hasan

1 A.I.R. 1949 Pat. 393

admittedly entered on the reference on the 19th January, 1949, and gave his award on the 18th May, 1949 i e within four months of his entering on the reference The award would, therefore be clearly within the prescribed period of four months and cannot be thrown out on the ground that it was given beyond limitation

On behalf of respondent, however, it has been argued before us that the date of entering on the reference should be taken to be the 19th October, 1948, i e, the date on which Nawab Sajjad Ali Khan entered on the reference No doubt if that is taken to be the date of the starting point of the period of four months prescribed under paragraph 3 cited above, it would have to be held that the award was given beyond the prescribed period We are, however, of opinion that the correct date for calculating the period of limitation should be the 19th of January 1949, the date on which Maulana Ibne Hasan entered on the reference, and not the 19th October, 1948, the date on which Sajjad Ali Khan entered on the reference In our opinion, the date on which Nawab Sajjad Ali Khan entered on the reference should be ignored in taking into consideration the period of four months, because Nawab Sajjad Ali Khan subsequently refused to act as an arbitrator The arbitration proceedings which took place before Nawab Sajjad Ali Khan, therefore, became infructuous In our opinion the arbitrators referred to in paragraph 3 of the First Schedule cited above are the arbitrators who refused to make the award In the present case the arbitrator who made the award was Maulana Ibne Hasan and not Nawab Sajjad Ali Khan Hence the date on which Maulana Ibne Hasan entered on the reference should be taken to be the relevant date The argument on behalf of the respondent is that the noun used in paragraph 3 is a plural one, i e, 'the arbitrators', hence it would include all arbitrators, whether they are to act simultaneously or alternatively The argument might have been worthy of consideration if the provision in the award had related to arbitrators who had to act simultaneously In the present case, however, the arbitrators

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NAWAB SYED HASAN ALI KHAN v. NAWAB ASKARI BEGAM alias NAWAB ABA BEGAM

Beg, J

were to act alternatively Hence the date of entering on the reference should be the date on which the arbitrator who was to act in the alternative entered on the reference For the above reasons, we are of opinion that the judgment of the lower court is erroneous and must be set aside

We accordingly, allow this appeal set aside the order of the trial court and remand the case to the trial court for proceeding with the disposal of the case according to law in the light of the observations made by us above The appellant will be entitled to his costs

The stay order is discharged

Appeal allowed

CIVIL REFERENCE

*Before Mr Justice Beg and Mr Justice V D Bhargava**

MESSRS CHHAJJOO RAM MOOL CHAND
(APPLICANT)

v

STATE (OPPOSITE PARTY)

1959

March, 11

Sales Tax—*Assessment year and previous year, distinction between —U P Sales Tax Act,* 1948 *s* 7, *(prior to amendment in* 1954) *sub-clause* 3, *scope of*

Held that it is wrong for the Sales Tax Officer to assess the liability of a firm to tax on the basis of its turnover for the assessment year as sub-clause 3 of s 7 of the U P Sales Tax Act provides that in assessing the tax to the best of his judgment the Sales Tax Officer shall take into consideration the turnover of the dealer for the previous year

Civil Reference No 13 of 1956, made by B R Varma, Judge, (Revisions Sales Tax, U P)

The facts appear in the judgment

B N Roy and *Jai Kishore Srivastava* for the applicant.

The Senior Standing Counsel for the opposite party

*Sitting at Lucknow

The judgment of the Court was delivered by—

BEG, J.—This is a reference under section 11 of the U. P. Sales Tax Act. The applicants in the case are Chhajjuram Mool Chand, Lalkuan, Delhi, a firm carrying on business as forest contractors in Nepal. The head office of the firm is at Delhi. The firm carries on business in cutting timber in the Nepal forests and preparing Railway sleepers among other things, from it. The sleepers are brought to the railway stations Tikonia and Chandan Chauki, which are situate in Uttar Pradesh. From these stations they are distributed to the various purchasers. The applicants were assessees under the Sales Tax Act for the year 1948-49. A notice under section 21 of the Sales Tax Act was issued to them on the ground that a part of their income had escaped assessment. In response to this notice the applicants produced their account books. These account books were rejected by the Sales Tax Officer who made the assessment on the basis of the best judgment. He also held that the sales of these sleepers were completed at Tikonia and Chandan Chauki and the property in the goods passed to the buyers at those stations. The turnover to the business was, therefore, held to be assessable to Sales Tax Act in Uttar Pradesh.

Aggrieved with the said order the firm filed an appeal before the learned Judge (Appeals). The learned Judge set aside the assessment order and remanded the case for further enquiry in respect of three matters which in his view arose for consideration.

The Commissioner, Sales Tax, then filed an application in revision against the said order of remand. In that revision application the learned Judge (Revision) was of opinion that remand was not necessary and the case should have been decided by the learned Judge (Appeals) on merits. The learned Judge (Appeals) found that the sales at the railway stations were only conditional and were to be treated as complete only on the acceptance of the goods by the purchasers at the station of destination. He further held that, according to the general practice some railway sleepers were delivered unconditionally at the two railway stations, Tikonia and

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CHHAJJU RAM MODI CHAND v. THE STATE

Beg, J

Chandan Chauki In respect of these sleepers the sales were treated to be as complete sales within Uttar Pradesh He, therefore, remanded the case for ascertaining as to what was the turnover of the sleepers unconditionally delivered at Tikonia and Chandan Chauki railway stations

The applicants went up in revision against that order of the appellate court This revision application was rejected mainly on the ground that the final assessment had not been made till then and the application was, therefore, premature Thereafter the applicants made an application under section 11 of the U P Sales Tax Act, praying for a reference to the High Court That application having been dismissed, the applicants moved the High Court for action under section 11 of the U P Sales Tax Act The High Court allowed the said application and held that a reference should have been made in the case Two questions were framed by the High Court on which the authority concerned was directed to state the case These two questions are as follows

> 1 Whether in view of the provisions of section 7 (3) of the Act the Sales Tax Officer was right in law in assessing the liability of the firm to tax on the basis of its turnover for the assessment year?
>
> '2 Whether an assessment under section 21 of the Act must not be completed within three years from the end of the assessment year?

Thereupon the learned Judge (Revisions), Sales Tax, Uttar Pradesh, prepared a statement of the case on the above two questions and submitted it to the High Court. The reference under section 11 of the U P Sales Tax Act has, accordingly, been fixed for hearing before us to-day

At the very outset, it may be mentioned that the learned counsel for the applicant has stated that he does not wish to press the point raised in question no 2 That point may, therefore be taken to be decided against the applicant

So far as question no 1 is concerned, we are of opinion that this reference must be allowed It may be mentioned that the U P Sales Tax Act was amended in the year 1954 and in this particular case we are concerned with the law as it stood prior to the amendment of the main Act by the Amending Act Section 7 as it stood prior to the amendment in 1954 ran as follows

> 7 (1) Subject to the provisions of section 18, every dealer whose turnover in the previous year is Rs 12,000 or more in a year shall submit such return or returns of his turnover of the previous year within sixty days of the commencement of the assessment year in such form and verified in such a manner as may be prescribed
>
> Provided
>
> Provided
>
> (2)
>
> (3) If no return is submitted by the dealer under sub section (1) within the period prescribed in that behalf, or, if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such inquiry as he considers necessary, determine the turnover for the dealer for the previous year to the best of his judgment and assess the tax on the basis thereof
>
> Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him '

Sub clause (3) of section 7 cited above clearly lays down that in assessing the tax to the best of his judgment the Sales Tax Officer shall take into consideration the turnover of the dealer ' for the previous year" In view of the clear provisions of this section it is difficult to entertain two opinions on the above point, and it must be held that the Sales Tax Officer was wrong in assessing the liability of the firm to tax on the basis of its turnover for the assessment year It is obvious that for the

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Beg, J

purpose of making assessment to the best of his judgment the Sales Tax Officer should have taken into consideration the turnover for the previous year

The same question arose in this Court in two Civil References, viz, *Kishori Lal Kunj Behari Lal* v *Commissioner of Sales Tax* (1) and *Amarnath Shambhoonath* v *Commissioner, Sales Tax, Uttar Pradesh* (2) In both the references the same answer was given

For the above reasons we allow this reference and direct the authority concerned to dispose of the matter in the light of the conclusions given by us above The excess tax, if any, paid by the assessees shall be refunded to the assessees The applicants are entitled to their costs which we assess at Rs 100

Reference allowed

SUPREME COURT

APPELLATE CRIMINAL

Before Hon'ble Mr Justice Sinha, Hon'ble Mr Justice Gajendragadkar and Hon'ble Mr Justice Wanchoo

P R CHAUDHRY

v

STATE OF UTTAR PRADESH

1959

May 14

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Railway Servants—*Whether and how far 'public servants'—Prevention of Corruption Act* 1947 *ss* 2 5 (2) 5 (1), (*c*) *and* 5 (1) (*d*)—*Indian Penal Code*, 1860 *ss* 21 409 *and Ch IX—Indian Railways Act*, 1890 *ss* 132 (1) *and* 137 (4)

After the nationalization of railways railway servants became and are public servants within the ambit of s 21 of the Penal Code and for the purposes of the Prevention of Corruption Act without any recourse to the statutory fiction introduced by

(1) Civil Reference no. 4 of 1955 decided on 30th October 1958

(2) Civil Reference no 14 of 1956 decided on 22nd January 1959

s 137 of the Railways Act and there is accordingly no reason to restrict it to offences under Chapter IX and s 409 of the Penal Code Moreover the restriction is irrelevant where the offence in question is covered by s 5 of the Prevention of Corruption Act itself

Case law discussed

Criminal Appeal No 20 of 1957 (connected with Criminal Appeal No 21 of 1957) from an order of the Allahabad High Court, (Lucknow Bench), at Lucknow, dated the 14th September, 1955, in Criminal Appeal Nos 374 and 376 of 1956, arising out of the judgment and order, dated the 24th April, 1954 of the Sessions Judge, Lucknow, in Sessions Trial No 106 of 1951

The facts appear in the judgment

R L Anand, Senior Advocate (*S N Anand*, Advocate, with him) for the appellant in Criminal Appeal No 20 of 1957

N C Chatterjee, Senior Advocate (*D N Mukherjee*, Advocate, with him) for the appellant in Criminal Appeal No 21 of 1957

H R Khanna and *R H Dhebar*, Advocates, for the respondent

The judgment of the Court was delivered by—

GAJENDRAGADKAR, J —Are the appellants S Gangoli and P R Chaudhri, (hereafter called appellants 1 and 2 respectively), public servants under section 2 of the Prevention of Corruption Act, 1947, (II of 1947), (hereafter called the Act)? That is the short question which arises for our decision in the present appeal That question arises in this way

Chaudhri had been posted as Assistant Permanent Way Inspector, Sultanpur, East Indian Railway, in March, 1948, in the Lucknow E I R Division Gangoli was posted as Assistant Pay Clerk in the Lucknow E I R Division during the same period The case against the appellants was that they had committed an offence under section 120 B of the Indian Penal Code and section 5 (2) read with sections 5 (1) (*c*) and 5 (1) (*d*) of the Act It appears that in accordance with the Pay Commission s Report a sum of Rs 16,685 was entrusted to

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appellant no 2 by the Railway Department to be disbursed among Class IV staff working under appellant no 1 This payment had to be made in the presence of, and was to be attested by appellant no 1 According to the prosecution both the appellants had entered into a criminal conspiracy to misappropriate a part of the said government amount entrusted to appellant no 2 by paying to the respective members of Class IV staff lesser amounts than those to which they were entitled and by making entries in the pay sheets which purported to show that the due amounts had been paid to them In accordance with this conspiracy payment was made on 11th March, 1948 in a running train between Faizabad and Chilbila and the entries in the pay sheets show that the whole of the amount of Rs 16,591 had been paid to 216 employees The entries also show that the payment had been made by appellant no 2 and the same had been attested by appellant no 1 In fact the whole amount had not been disbursed to the employees who in all were paid Rs 1 555 less In this manner the two appellants had misappropriated the sum of about Rs 1 555 and had falsified the pay sheets in pursuance of their conspiracy

Within a few days of the said payment the employees became suspicious because they learnt that persons recruited on the same day had been paid larger amounts as arrears Thereupon they approached the higher officers and made a complaint to them They were advised to present their grievance in writing and as a result some of the employees did present applications in writing complaining that they had not received the due payment of their arrears These representations led to an enquiry and Mr Dalip Singh in fact recorded some of the statements on 6th and 7th April, 1948 The prosecution alleges that this development alarmed appellant no 1 and he tried to hush up the matter by calling all the men together and paying them the amounts which had been previously wrongfully deducted from their arrears It is the prosecution case that on this day three documents were executed, Exs 5, 10 and 11, which would clearly show that the appellants had committed the offences charged against them

Both the appellants denied the charges They pleaded that they had not entered into any conspiracy and it was their suggestion that they had been falsely implicated in the present case Appellant no 1 pleaded that the case against him had been started, and false evidence had been secured by H H Das with the aid of Shambhu because relations between him and Das were not friendly Appellant no 2 pleaded that he had been falsely implicated because, contrary to the suggestion of the police he had refused to implicate appellant no 1 According to them the evidence adduced by the prosecution was interested and false, and the documents produced by it were either fabricated or irrelevant

In support of its case the prosecution examined 44 witnesses, relied upon the three documents, Exs 5, 10 and 11, and urged that the charges framed against the appellants were clearly established by the said evidence The learned Sessions Judge at Lucknow who tried the case against the appellants agreed with the unanimous opinion of the assessors and held thet the charges framed against the appellants had been proved beyond a reasonable doubt. He accordingly convicted them of the said offences and sentenced appellant no 1 to suffer rigorous imprisonment for three years and appellant no 2 to suffer rigorous imprisonment for two years

This order of conviction and sentence was challenged by the appellants by preferring appeals in the High Court of Judicature at Allahabad These appeals, however, failed and the High Court substantially agreed with the conclusions of the learned trial judge Mr Justice Kidwai who heard these appeals no doubt partly accepted the defence plea and held that Das was not a reliable witness and that he might have been responsible for the fabrication of Ex 10 The learned Judge also found that Shambhu was likewise an unreliable witness Even so it was held that the evidence of gangmen was on the whole satisfactory and that the documents Exs 5 and 11 corroborated the oral evidence adduced by the prosecution In the result the order of conviction and sentence passed against the appellants by the trial Judge was confirmed It is against this order passed by the High Court that the appellants have pre

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ferred the present appeals by special leave and the only point which they have raised before us is that their conviction and sentence are illegal because they are not public servants under section 2 of the Act

Section 2 of the Act provides that for the purposes of this Act public servant means a public servant as defined in section 21 of the Indian Penal Code It is not disputed that under section 21 the appellants are public servants The East Indian Railway which has employed the appellants was at the material time owned by the Government of India and managed and run by it and so if the status of the appellants had to be judged at the material date solely by reference to section 21 of the Code, there would be no difficulty in holding that they are public servants as defined by the said section

It is, however, urged that, for determining the status of a railway servant it is necessary to consider section 137 of the Indian Railways Act, 1890, (9 of 1890) It may be recalled that when this Act was passed almost all the railways in India were owned and managed by public limited companies and as such railway servants as defined by section 3 (7) of the Railways Act could not be treated as public servants under section 21 of the Code After the railways were nationalized and taken over by the Government of India, this position has materially altered But prior to the nationalization of railways, the position was that railway servants as such did not fall under section 21 of the Code That is why section 137 (1) and (4) purported to bring them within the definition of public servants contained in the said section Sub-section (1) of section 137 provides that every railway servant shall be *deemed* to be a public servant for the purposes of Chapter IX of the Indian Penal Code The effect of this sub section is to treat railway servants as public servants under section 21 for the purpose of offences relating to public servants which are dealt with by sections 161 to 171 in Chapter IX of the Code It is thus clear that the result of this provision was to treat railway servants as public servants even though they did not satisfy the requirements of the definition of section 21 Having provided for the extension of the said

definition to railway servants for the purposes of Chapter IX of the Code, sub section (4) prescribed that notwithstanding anything contained in section 21 of the Indian Penal Code a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in sub section (1) It is on this sub section that the appellant s arguments is based It is urged by Mr *R L Anand* that this sub section clearly provides that railway servants shall not be deemed to be public servants except for the purposes of Chapter IX and since the appellants had not been charged with any of the offences in Chapter IX of the Code they can not be treated as public servants for the offences under sections 5 (1) and 5 (2) of the Act It is true that these two sub sections have been amended by Act 17 of 1955 Sub-section (4) has been deleted and sub section (1) now provides that every railway servant being a public servant as defined in section 21 of the Indian Penal Code shall be deemed to be a public servant for the purposes of Chapter IX and section 409 of that Code In other words under the amended provision of section 137 (1) railway servants would be deemed to be public servants under section 21 of the Indian Penal Code only for the purpose of Chapter IX and section 409 of that Code We are however, concerned with the provisions of section 137 prior to its amendment in 1955

Now section 137 sub section (4) opens with the non-obstante clause and expressly states that a railway servant shall not be deemed to be a public servant for any of the purposes of that Code subject, of course, to the exception mentioned in sub section (1) The argument is that the non obstante clause has the effect of excluding the application of section 21 of the Code in all cases except those falling under Chapter IX of the Code and it is urged that since the offences charged against the appellants are outside Chapter IX of the Code, sub section (4) creates a bar against treating them as public servants for the purpose of the said offences. This argument, however ignores the relevant words for any of the purposes of that Code used in sub section (4) These words indicate that the bar created by sub section (4) applies, and is confined, to the purposes of that Code

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and cannot be extended beyond the said purposes What sub section (4) really provides is that if a railway servant is charged for an offence under the Indian Penal Code and the said offence is outside Chapter IX of that Code, he cannot be treated as a public servant. This sub section does not purport, or intend, to make any provision in respect of offences which are outside the Penal Code In respect of such offences, neither sub-section (1) nor sub section (4) of the Railway Act would apply, and the question as to whether railway servants fall within the mischief of the Act must be decided in the light of the provisions of the said Act itself

That takes us to the question whether the appellants can be said to be public servants under section 2 of the Act Section 2, as we have indicated, in substance incorporates in itself the definition of a public servant contained in section 21 of the Indian Penal Code There can be no doubt that the effect of section 2 of the Act is that the status of accused persons has to be determined by the application of section 21 of the Indian Penal Code as if the said section had been included in the Act If that be so, the appellants cannot resist the conclusion that they are public servants under section 2 of the Act The contention that because section 2 of the Act refers to section 21 of the Indian Penal Code, the bar created by section 137 (4) of the Railways Act would inevitably come into operation is unsound The said bar can be invoked only if the status of the accused person is being determined for any purposes of the Code other than those of Chapter IX In the present case the main offences charged are under the Act and not under the Code, and so section 137 (4) is inapplicable

With regard to the construction of section 137 (4), there is another consideration which may be indicated. Section 137 (1) brings within the definition of section 21 of the Code railway servants who but for it would not have satisfied the tests laid down in section 21 The deeming provision of sub-section (1) would be clearly inappropriate and unnecessary if the railway servants concerned could be treated as public servants under section 21 itself In other words, railway servants employed by the railway administration owned and

conducted by the Government of India would be public servants under section 21 as such without recourse to the statutory fiction introduced by section 137 (1) Having provided for this statutory fiction by sub-section (1) sub section (4) purports to cover the same ambit and to deal with the same class of railway servants and it provides that this class of persons shall not be deemed to be public servants except as mentioned in sub-section (1) This negative statutory fiction is only intended to emphasise the fact that persons who are treated as public servants by virtue of sub-section (1) can be dealt with only under the provisions of Chapter IX of the Code and no other Could it have been intended by the Legislature that sub-section (4) should exclude the application of the provisions of the Code other than those contained in Chapter IX to railway servants who would be public servants under section 21 without the aid of sub section (1) of section 137? *Prima facie* such an intention cannot be attributed to the Legislature It is true that the non obstante clause lends some assistance to the argument of the appellants that with the exception of the provisions of Chapter IX, section 21 of the Code would be inapplicable to railway servants, but the said non obstante clause cannot *prima facie* be wider in its scope than sub section (1) of the said section The said non obstante clause has apparently been inserted *ex abundanti cautela*, [*Rai Bahadur Kunwar Raj Nath* v *Pramod C Bhatt, Custodian of Evacuee Property* (1)], to clarify the effect of section 137 (1) The two sub-sections introduce a positive and a negative fiction respectively and thereby achieve the same result However, since we are concerned with the provisions of the Act and not with any provisions of the Code other than Chapter IX, it is unnecessary to pursue this point any further and to express a definite opinion on this aspect of the matter

We must now refer to the decisions to which our attention was invited The first case on which Mr *Anand* relied is the decision of the Punjab High Court in *Devi Ram Deep Chand* v *State* (2) In that case the accused were goods clerks employed by the railway and they were being prosecuted in the court of a First Class Magistrate

(1) 1955 2 S.C.R. 977 (2) A.I.R. 1954 Punj 159

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on charges under section 403 of the Penal Code It was urged on their behalf that the offences alleged against them were in substance offences under section 5 of the Act, and that they could be tried by a special Judge alone That is why the High Court was moved for a transfer of the case against them from the court where it was pending to the court of the special Judge From the judgment of the High Court it clearly appears that the learned Assistant Advocate General intimated to the court that the prosecution did not propose to frame or prove a charge against the appellants under section 5 of the Act Therefore, section 2 of the Act did not really fail to be construed by the Court, and so the observations made by DULAT, J that if the petitioners are not public servants within the meaning of section 21 of the Penal Code, they cannot be called public servants for the purposes of Act 2 of 1947 is clearly obiter If, however, this observation was intended to be a decision on the point, it must, with respect, be held to be based on a misconstruction of section 137 (4)

Mr *Anand* has also fairly invited our attention to two decisions of this Court—*Ram Krishan* v *The State of Delhi* (1) and *C A Montero* v *The State of Ajmer*—(2) which are *prima facie* against his contention In the first of these two decisions the appellants had been charged under section 120 B of the Indian Penal Code for criminal conspiracy to cause offence of criminal misconduct punishable under section 5 (2) of the Act to be committed by Madan Lal as also under that section read with section 116 of the Code They had been convicted by the special Judge on both the counts and their conviction had been upheld by the High Court In their appeal before this Court one of the points raised by the appellants was that Madan Lal was not a public servant within the meaning of the Act It appears that the offence in question had been committed on 29th December, 1951, and the argument was that under section 137 (1) and (4) Madan Lal who was a railway servant could not be held to be a public servant under section 2 of the Act CHANDRASEKHARA AIYAR, J, who

(1) 1956 S C R. 122. (2) 1956 S C R 682

delivered the judgment of the Court cited section 137 (1) and added that sub section (4) had been omitted by the amendment of 1955 Then the learned judge referred to section 2 of the Act and concluded thus The result is that before the amendment railway servants were treated as public servants only for the purpose of Chapter IX of the Indian Penal Code but now as the result of the amendment all railway servants have become public servants not only for the limited purpose but generally under the Prevention of Corruption Act With respect it may be pointed out that this observation seems to give to the amended provisions of section 137 of the Railways Act retrospective effect The question of the construction of the relevant sections does not appear to have been fully argued before this Court and it has not been considered It is nevertheless true that in respect of an offence committed in 1951 Madan Lal was held to be a public servant under section 2 of the Act

In the case of *Montesso* (1) the main point raised before this Court was whether the accused was a public servant under section 21 of the Code and that was considered by this Court in dealing with that question this Court construed section 21 and held that the appellant was an officer within the meaning of section 21 (9) and therefore a public servant within the meaning of section 21 Incidentally reference has been made to the earlier decision of this Court in the case of *Ram Krishan* (2) and it has been observed that the said decision lays down that before the amendment of section 137 of the Railways Act by Act 17 of 1955 railway servants were treated as public servants only for the purposes of Chapter IX of the Indian Penal Code but in any event they were public servants under the Prevention of Corruption Act With respect this latter statement does not appear to be borne out by the judgment in the case of *Ram Krishan* (2)

Going back to section 2 of the Act once more we must hold that in defining a public servant it enacts the same

(1) 1956 S C R 682 (2) 1956 S C R. 182

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definition as section 21 of the Indian Penal Code and under this interpretation section the appellants undoubtedly are public servants The result is the courts below were right in holding that the appellants could be properly charged and tried for offences under section 5 (2) read with section 5 (1) (*c*) and section 5 (1) (*d*) of the Act The validity of the charge under section 120 B has not been and cannot be challenged

Mr *Anand* for appellant no 1 and Mr *Chatterjee* for appellant no 2 appealed to us to reduce the sentence passed against their clients It was urged in support of this plea that though the charge against them was in respect of a large amount of Rs 1 555 evidence had been adduced to prove misappropriation of Rs 218 which is a much smaller amount We do not think that in the circumstances of this case the actual amount shown to have been misappropriated has a decisive or even a material bearing on the question of sentence The positions respectively occupied by the appellants the relations between them and the Class IV servants the method adopted by the appellants in committing the offence and the other circumstances have all been considered by the courts below in passing concurrently the respective orders of sentence against the appellants In our opinion there is no justification for interfering with the said orders

The appeals accordingly fail and are dismissed The appellants to surrender to their bail bonds

Appeals dismissed

CIVIL REVISION

Before Mr Justice Gurtu and Mr Justice Dwivedi

RAM JIWAN MISRA AND ANOTHER (DEFENDENTS)

v

JIWAN MISIR AND OTHERS (PLAINTIFFS)

1959

July 16

Res Judicata—*Finding inter alia on locus standi of plaintiff in earlier suit—Whether operates as res judicata in subsequent suit—Code of Civil Procedure* 1908 *s* 11

A suit for redemption of mortgage was dismissed by the trial court on the ground that the mortgage had not been proved The appeal against this was dismissed on the finding firstly that the plaintiff was not the successor of the original mortgagor and secondly that the mortgage was not established In the subsequent suit between the same parties and in respect of the same plots

Held that the finding of the appellate court on the first point in the earlier suit operated as *res judicata* in the latter since in the proper sequence of the matters in issue the first point for determination in every case is the *locus standi* of the plaintiff and the finding thereon cannot be said to be incidental or unnecessary

Shanker Lal Patwari v *Hira Lal Murarka* (1) *and Shib Charan Lal* v *Raghunath* (2) *relied on*

Civil Revision no 214 of 1950 from an order of Krishna Chandra Srivastava District Judge Banaras dated the 18th December 1949

The facts appear in the judgment

Mukhtar Ahmad for the applicant

K N Seth for the opposite parties

The judgment of the Court was delivered by—

GURTU, J —This is a civil revision which has been referred to a Bench

The plaintiff brought a suit as successor of the original mortgagor to redeem the mortgage under section 12 of the Agriculturists Relief Act In defence to the suit the bar of section 11 of the Code of Civil Procedure was raised

(1) A I R 1950 P C 80 (2) (1895) I L R. 17 All. 174

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GUPTA J.

It appears that there was a previous litigation inter parties relating to the very same plots in respect of which another mortgage had been made. The instant suit was in regard to a subsequent mortgage. When the prior suit was heard the trial court held that the mortgage set up in the prior suit was not proved. Upon that finding the prior suit was dismissed. The plaintiff of that suit preferred an appeal and the appellate court recorded two findings in the appellate judgment. The first issue was as to whether plaintiff of that suit was the successor of the original mortgagor. This issue was answered against the plaintiff. The second question that was considered by the appellate court in that suit was whether the mortgage had been proved. The court came to the conclusion agreeing with the trial court that the mortgage had not been established. That finding of the appellate court in the previous suit whereby the appellate court had held that the plaintiff of that suit was not the successor in interest of the mortgagor who had created the mortgage in that suit operated as *res judicata* in the instant suit. It may be stated that in the instant suit also the plaintiff was claiming to be the successor in interest of the original mortgagor the original mortgagor being the same, both in this suit and in the previous suit. The trial court in the instant suit decided that the suit was barred by *res judicata* because of the decision on the question of the plaintiff's title to redeem the mortgaged property in the earlier suit. The court below however, has come to the conclusion that the primary matter which called for consideration in the earlier suit was whether the mortgage was established and that the question whether the plaintiff of that suit was entitled to institute the suit, i.e. whether the plaintiff had a *locus standi* was not directly in issue in the previous suit and the decision of that question was not essential for the disposal of that case, and has held that the finding on *locus standi* in the earlier suit cannot, therefore operate as *res judicata* in the instant suit.

We are therefore, to consider whether the decision of the issue in regard to the plaintiff's right to sue in the previous suit was essential for the disposal of that suit or

not Learned counsel for the applicant has urged that it was essential and that that question was directly and substantially in issue and that the question whether there was or was not a valid mortgage was a question which would only arise if the plaintiff in that suit established his *locus standi* as successor in interest of the original mortgagor On the other hand learned counsel for the respondents has urged that the trial court had disposed of the suit on the finding that the mortgage was not established and that in the plaintiff s appeal the court below was not called upon to decide whether the plaintiff had a *locus standi* to sue or not, if the court below was taking the same view in regard to the establishment of the mortgage as the trial court had taken and the contention is that the decision by the appellate court in regard to the right of the plaintiff in that suit to bring a suit was a decision merely incidental and that finding in regard to the right of the plaintiff of that suit to file a suit could not operate as *res judicata* in this instant case We have considered the question raised before us carefully In every suit the first essential is that the plaintiff should establish his *locus standi*, i e his right to bring a suit If the plaintiff fails to do so the suit must be dismissed irrespective of the merits or demerits of the other allegations in his plaint Therefore in the sequence of things the first step for the plaintiff is to establish his *locus standi* That is why in the very first paragraph of every plaint the *locus standi* of the plaintiff is alleged Once the plaintiff s right to sue is established then the other allegations which he makes are to be established by him and if he succeeds in establishing his allegations then his suit is decreed But if his *locus standi* is not made out then the suit fails and no other question really arises We have no doubt that this is the position ordinarily speaking but learned counsel for the respondents has urged that the situation here is somewhat different and that it is the finding given in the appellate court s judgment in the previous suit which is being sought to be used as *res judicata*, even though the trial court gave no finding on the issue of plaintiff s right to sue He contends that the appellate court was not called upon to record any other finding than the finding

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Gurtu J.

in regard to whether the mortgage was duly established because the trial court had only recorded that finding and had disposed of the suit on that basis

We may here point out that in the grounds of appeal in the previous suit the plaintiff who had lost the suit himself invited the court to decide the other issues raised therein Secondly it seems to us that in a suit on a mortgage it would not be said that, if a decision was given in regard to whether the plaintiff was the successor in interest of the mortgagor, that that finding was incidental and that the first question in a mortgage suit merely is whether the mortgage is established No doubt a plaintiff in a mortgage suit for redemption asserts that there is a mortgage and that he is either the mortgagor or the successor of the mortgagor but at the same time as soon as he brings a suit, he must first establish that he is the mortgagor or the successor and this he is called upon to do on the assumption that the mortgage had been established *Prima facie* he alleges that there is a valid mortgage in existence and, in the first instance, that *prima facie* allegation in the plaint may be accepted and then the question is as to whether he has a right to sue

In a case where the plaintiff is seeking as successor of the mortgagor to redeem the mortgage, it seems very difficult to say that the question of his *locus standi* is of secondary importance and the question whether the mortgage has been duly established is of the first importance The two questions in a certain way are interconnected and interlinked and in the present case we cannot say that in the previous suit when the appellate court decided to give a finding both on the questions whether the plaintiff in that suit was successor in interest of the mortgagor and entitled to bring a mortgage suit and whether the mortgage was established the court was taking upon itself the decision of an issue so far as the first point was concerned, which did not call for decision No doubt by the previous appellate judgment there was a dismissal of the appeal and, therefore the decree of the first court was not reversed It is true that the first court s decree cannot be said to have been completely

merged in the second court s decree except for purposes of calculation of limitation as has been pointed out by their Lordships of the Supreme Court in the case of *State of U P* v *Mohammad Nooh* (1) but nonetheless the finding which could operate as *res judicata* is not the finding of the trial court but the finding of the court of appeal and so the appellate judgment must perforce be looked at In these circumstances it is necessary for us to see whether the decision of the court of appeal in the first suit that the plaintiff had no *locus standi* did not in point of fact, effectively dispose of the suit so that the second question namely, whether the mortgage was fully established became in a sense ancillary

We think that the court of appeal in the previous case was entitled to record a finding on the question of the *locus standi* of the plaintiff in that suit despite the fact that the trial court did not do so Its powers are no less than the powers of the trial court and inasmuch as it has recorded that finding we think that that finding cannot be ignored because the suit really could be dismissed on that finding alone and the second finding in regard to whether the mortgage was established was, in a sense, not absolutely essential for decision for the disposal of the suit We do not think that the appellate court is debarred from considering all the points that arise in the case, and if it has done so, then its judgment must be looked at to see which finding is of the first importance from the point of view of sequence If the finding is on the first point in sequence and is capable of finally disposing of the suit that must be considered to be a finding which in a subsequent litigation would be liable to operate as *res judicata*

We are fortified in what we are saying by the decision reported in *Shib Charan Lal* v *Raghu Nath* (2) where it was pointed out that until the legal representative who was suing had established his title to sue upon the contract the defendant could not be put to proof of his plea that he was a minor and that the contract was not binding upon him We may also point out that in the case of *Shanker Lal Patwari* v *Hira Lal Munarha* (3),

(1) A I R 1958 S C 86 (2) (1895) I L R 17 All 174 195

(3) A I R 1950 P C 40

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Gurtu J

where a court had held that a suit was not maintainable by reason of failure to comply with section 80 of the Civil Procedure Code the findings given on merits were treated as *obiter* and it was held that these findings did not support the plea of *res judicata* either in favour of or against the party We may point out that section 80 says that no suit can be instituted against the Government until the expiry of two months next after notice in writing had been delivered and in a case where there is no proof that such a notice had been delivered the suit would fail in the absence of proof irrespective of the fact whether the plaintiff had or had not a good case The proof of notice in the sequence of allegations required to be proved by the plaintiff would come first In the same way in the sequence the allegation that the plaintiff had the representative character which he was alleging as mortgagor would call for establishment and proof in the first instance before the proof of the mortgage according to law

After having considered the matter very carefully we are of the view that we must set aside the order of the learned District Judge, dated the 13th December, 1949, and restore that of the trial court We order accordingly

Costs will be on the parties

Revision allowed.

CIVIL REFERENCE

Before Mr Justice V D Bhargava and Mr Justice Misra

MAHARAJA PATESHWARI PRASAD SINGH

(APPLICANT)

v

STATE (OPPOSITE PARTY)

1959

August 14

United Provinces Agricultural Income Tax Act, 1948 *s* (2) (1) (*a*) *s* 5 *s* 6 *s* 5 (*d*) *s* 6 (2) (*b*) (*v*) *s* 25 *and s* 24 *and Rule* 17 *validity and scope of—Donation to an educational institution recognized by the State, scope of—Hospitals in receipt of grant scope of—Communication of the judgment under s* 25 *meaning of*

United Provinces Agricultural Income Tax Act is a fiscal Act and it will be interpreted in accordance with the following six principles of interpretation

(1) A fiscal Act must be strictly construed and no tax can be imposed on the subject without words in the Act clearly and expressly showing an intention to lay a burden upon him

(2) In cases of doubt it should be construed in favour of an interpretation beneficial to the subject and if two constructions are equally possible and reasonable the construction most favourable to the subject must be enforced

(3) Arguments that the tax falls within the spirit of law or that on equitable grounds tax should be imposed are not available to the Taxing Authority Tax and equity are strangers while interpreting a taxing statute

(4) If there is an exemption it must be construed so far as possible in favour of the assessee and strictly construed as against the State

(5) Such a statute should be interpreted against double taxation but if the assessee is entitled to double advantage on a fair reading of the Act he should be given the benefit of it

(6) Avoidance of income tax within the four corners of the Act would be justifiable

Held (*a*) that the word derived in *s* 2 (1) (*a*) in the U P Agricultural Income Tax Act means obtained or received and therefore the Agricultural Income of an assessee should be that net amount which he actually realizes or receives and not what one should get or should have realized

Sitting at Lucknow

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(ii) that an assessee is entitled to collection charges on the sum realized by him whether it is realized directly from the tenants or through the thekedars Section 9 of the Act does not specify that the realization on which collection charges would be allowed should be from the tenants and not from thekedars

(iii) that the sale proceeds of the old grain stock sold during the previous year should not be included in the Agricultural Income of the assessment year 1355F

(iv) that the words irrigation productive or protective in the phrase irrigation productive or protective work construed for the benefit of the land in s 5 (d) and s 6 (b) (v) are all independent of each other and a work which is either for irrigation or productive or protective will be covered by these two sections Further that the work would be productive or protective either if it actually results as such or it tends to be such It is not necessary that in every case it must result in actual gain If the work is such that it increases the value of the land it will always be of a productive nature

(v) that in order to find whether any expenditure comes under the above head in the two sections or not there are two things which are necessary—

(a) Whether the work is either for the purpose of irrigation or productive or protective and

(b) Whether it was for the benefit of the land If these two things are present the expenditure would be exempted under this head whether it results in extra income or not is immaterial

(vi) that where on a representation of the State Govt the assessee acted *bona fide* in giving certain donations the State would be precluded from charging any income tax over such donations which the assessee has *bona fide* paid in pursuance of rule 17 framed under U P Agricultural Income Tax Act

(vii) that rule 17 framed under the U P Agricultural Tax Act was not purported to have been framed under s 8 of the Act but it had been made under s 44 of the Act and it having been laid before the Legislature and having been acted upon *bona fide* by the assessee who had derived advantage it is not now open to the State to have the law declared *ultra vires* retrospectively to affect the past and completed transactions having taken place on the basis of that rule The answer may have been different if no benefit to the subject had accrued and the State had derived unfair benefit by means of the *ultra vires* rule

Quebec v Quebec Central Railway Co, (1) considered.

1 (1894) 10 S C R of Canada 564 610 and 614

Held (viii) that an Explanation to rule 17 framed under the U P Agricultural Income Tax Act is not to be interpreted and applied independently of the rule and the Explanation to rule 17 is controlled by the rule itself

(ix) that the hospitals which were subject to general inspection by the Civil Surgeon cannot be treated as hospitals in receipt of a grant from the Govt within the meaning of the notification issued under rule 17 framed under the U P Agricultural Income Tax Act

(x) that the two powers in sub s (1) and sub s (2) of s 24 are wholly independent The power under subs (1) to refer a question *suo motu* can always be exercised irrespective of the facts whether any reference has been made under subs (2) or not

(xi) that if an amount is donated to an educational institution recognized by the State e g an University a College or any other school which is either recognized by the State Govt or by any of the local authority then in that event it would amount to a donation to that institution within the meaning of rule 17 whether it is paid for the purpose of maintenance of the school for payment as scholarships to students for prize distribution for Jubilee celebration or for any other purpose connected with this institution But if the amount is paid directly to students who may be the students of a recognized school the donation would not come within the purview of rule 17 framed under the U P Agricultural Income Tax Act

(xii) that if the amount has been paid to an institution recognized by the State Govt or a local authority though earmarked for scholarship it would be a donation within the meaning of rule 17 framed under the U P Agricultural Income Tax Act but simply because the amount has been paid for scholarship to an institution would not make the institution an aided institution within the meaning of rule 17

(xiii) that condition (*b*) in the schedule of rates is applicable to Part I alone and not to both the parts

(xiv) that the knowledge of the order passed by the Revision Board on the 20th of March 1954 in revision applications nos 149 150 151 161 162 and 163 of 1953 said to have been derived from a copy of the judgment obtained by the clerk of the counsel for the applicant did not amount to communication to the assessee within the meaning of the word as used in s 25 of the U P Agricultural Income Tax Act and the application for reference consequently is not time barred

Agricultural Income Tax Reference no 2 of 1953 for revision of the order of Agricultural Income Tax Board, dated 5th December, 1952

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The facts appear in the judgment

Iqbal Ahmad and *B K Dhaon* for the applicant

The Advocate General (*K L Misra*) and Standing Counsel for the opposite party

The judgment of the Court was delivered by—

V D BHARGAVA, J —These are 14 references under section 24 of the U P Agricultural Income Tax Act (Act III of 1949) made by the Board of Agricultural Income tax, U P Lucknow All these references relate to the assessment of the assessee Maharaja Pateshwari Prasad Singh of Balrampur Estate district Gonda in the State of Uttar Pradesh and they arise out of three accounting years, viz 1355 1356 and 1357 Fasli The assessee was taxed to a sum of Rs 7 98,614 7 for the year 1355 Fasli on the 23rd June 1949 That was subsequently enhanced to a sum of Rs 8 10 295 9 when it was discovered that the assessee owned some other properties outside the district of Gonda which had escaped assessment The assessee was taxed to Rs 9 31,090 14 for 1356 Fasli on the 28th October, 1949 and to Rs 8 11 961 14 for 1357 Fasli on the 18th of November, 1950 There was no dispute about enhancement of the assessment made for the year 1355 Fasli, but three appeals were filed against the original assessment On behalf of the State it was prayed that notice for enhancement should be issued, therefore the Commissioner of Agricultural Income tax issued three notices for enhancement with respect to the three appeals

The three appeals filed by the assessee against his assessment of three accounting years 1355 1356 and 1357 Fasli and the three respective notices of enhancement were all disposed of together by the Commissioner on the 28th February 1952 By his order he dismissed all the appeals and enhanced the taxes of 1355 Fasli from Rs 8 10 295 9 to Rs 10 33 818 11, of 1356 Fasli from Rs 9 31 090 14 to Rs 9,75 157 13 and of 1357 Fasli from Rs 8 11,961 14 to Rs 8 87 608 15

Three applications for revision were filed by the assessee under section 22 of the Act to the Agricultural Income tax Board U P for three years assessment on

the 28th of April 1952 and on the same day three applications were filed by the assessee under section 24 requiring the Board to refer certain questions of law to the High Court which arose in the case

On the 28th May 1952 three applications were filed by the State in revision under section 22 complaining of under assessment These nine applications i e three revision applications under section 22 three applications under section 24 and three applications by the State under section 22 were heard at length by the Board in November 1952 and by their decision, dated the 5th December 1952 they partially allowed the applications of the assessee and they referred the following five questions to the High Court for opinion

(1) Whether on the facts of the case the assessee is entitled to collection charges on the amount realized from thekedars?

(2) Whether the sale proceeds amounting to Rs 27 419 9 6 of the old grain stock sold during the previous year be included in the agricultural income of the assessment year 1355 Fasli?

(3) (a) Whether tube wells and other irrigation works constructed by the assessee for the benefit of the land?

(b) Is he entitled to a deduction of such expenses?

(4) Whether rule 17 framed under the Agricultural Income Tax Act goes beyond the scope of section 8 and is it *ultra vires*?

(5) Whether condition (b) in the schedule of rates is applicable to Part I alone or to both Parts I and II?

These five questions included the questions which the State wanted to be referred to the High Court By the same judgment they finally decided certain questions and for the decision of certain matters they remanded the case to the assessing authority On the 5th of February, 1953 six applications were moved under section 24 (2) of the Act for reference on certain points which also arose from the points which had been finally decided by the Board

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These applications were pending and in the meantime on the 6th of April 1953 the Assessing Authority submitted its findings on the matters which had been remanded to it. The six applications filed on the 5th February 1953 for further reference of certain questions and the six applications of revisions dated the 24th April 1952, were heard together and were disposed of on the 26th March 1954 and six more questions by their order were referred to this Court and they are as follows. They have been numbered as 6 to 11.

(6) Whether the amount spent on repairs and maintenance of pathways and roads in the *ilaqa* of Balrampur Estate are expenses incurred on the construction or maintenance of any irrigation or protective work constructed for the benefit of the land from which agricultural income is derived within the meaning of section 5 (*d*) and section 6 (2) (*b*) (v)?

(7) Whether exemption can be allowed in respect of such expenses under rule 17?

(8) Whether the Explanation to rule 17 is controlled by the rule itself or is it to be interpreted and applied independently of the rule?

(9) Whether the hospitals which were subject to general inspection by the Civil Surgeon can be treated as hospitals in receipt of a grant from the Government within the meaning of the notification issued under rule 17?

(10) Whether scholarship paid to students were donations to an institution or fund within the meaning of rule 17?

(11) Whethat the amount paid to an institution marked for scholarship can be treated as donation to the institution within the meaning of rule 17, or can the institution on that ground be treated as an institution aided by the Government within the meaning of rule 17?

The 13 references no 2 of 1953 and nos 1 to 12 of 1956 arise out of the above questions. The assessee was informed by a letter dated the 2nd April 1954 that his

six applications for reference (of 5th February, 1953) had been allowed but there was no mention in that communication sent to the assessee that the matters which had been remanded originally to the Assessing Authority and whose findings had come back to the Board had also been decided A certified copy of the order dated the 26th March 1954 was applied for on the 13th of May 1954 and the copy was delivered on the same day The general agent received the copy somewhere in September 1954 and on 30th September 1954 an application for reference was made under section 24 (2) in respect of all the six revision applications which had been disposed of on merits after the findings of the Assessing Authority for reference again to the High Court as even in the points which had been finally disposed of in those revision applications there were certain questions of law involved On the 28th February 1955 the Board rejected the application in revision under section 24 (2) filed by the assessee on the 13th of September 1954 on the ground that the applications had been filed beyond time

The assessee filed an application on the 9th July, 1955, in this Court under section 24 (4) of the Agricultural Income Tax Act against the order dated the 28th February, 1955, rejecting the application of the assessee under section 24 (2) of the Act and this was numbered as Reference no 1 of 1955 The court by its order dated the 26th of July 1957 directed the Board to send its statement on two more points of law and the Board has submitted its statement dated the 19th May, 1958, wherein the following two questions have also to be answered by this Court

> (12) Whether knowledge of the order passed by the Revision Board on the 26th of March, 1954, in revision applications nos 149, 150 151, 161, 162 and 163 of 1953, said to have been derived from a copy of the judgment obtained by the clerk of the counsel for the applicant amounted to communication to the assessee within the meaning of the word as used in section 23 of the Agricultural Income Tax Act ?

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(13) Whether the application for reference was or was not barred by time?

After the statement of the case this reference has been numbered as 5 of 1958 and which has also been directed by us to be heard along with other references

We have thus before us 13 questions which have to be answered in these 14 references We propose to deal with them one by one

Learned counsel for the assessee in the beginning of his arguments had drawn our attention to the fact that Agricultural Income Tax Act is a fiscal Act which lays a burden rather a very heavy burden, upon a subject and therefore, it must be strictly construed and unless there is clear and unequivocal language the tax should not be imposed

We are conscious of this fact that the Agricultural Income Tax Act is a fiscal Act and there are certain well known and well established principles of interpretation which hardly need any authority at the moment and according to which a fiscal statute should be interpreted For the sake of brevity without making a reference to the authorities they might be stated as follows

(1) A fiscal Act must be strictly construed and no tax can be imposed on the subject, without words in the Act clearly and expressly showing an intention to lay a burden upon him

(2) In cases of doubt it should be construed in favour of or beneficial to the subject, and if two constructions are equally possible and reasonable the construction most favourable to the subject must be enforced

(3) Arguments that the tax falls within the spirit of law or that on equitable grounds tax should be imposed are not available to the Taxing Authority Tax and equity are strangers while interpreting a taxing statute

(4) If there is an exemption, it must be construed so far as possible in favour of the assessee and strictly construed as against the State

(5) Such a statute should be interpreted against double taxation but if the assessee is entitled to double advantage on a fair reading of the Act, he should be given the benefit of it

(6) Avoidance of income tax within the four corners of the Act would be justifiable

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We will now proceed to deal with the questions of law seriatim

Question no 1—Whether on the facts of the case the assessee is entitled to collection charges on the amount realized from thekedars?

This question arises because there are two methods of realization of rent in the estate of the assessee There are some villages which are known as kham villages and in these villages, it is the agency of the estate itself which realizes rent directly from the tenants But the greater number of villages are not kham villages, but thekedari villages, i e the estate has given certain areas, to certain thekedars on payment of certain amounts The thekedars realize the rent and make the payment to the estate The realizations made during the year 1355 Fasli from the kham villages amounted to Rs 9,10,894, while the amount realized from the thekedars was Rs 20,01,874 The Manager of the estate was asked to send a report as to what would be the gross rental of the thekedari villages, and from the report it appears that the gross rental from the thekedars was Rs 24,32 219 The Assessing Authority allowed the collection charges on the amount of rent which had been realized directly from the tenants in the *kham* villages, but disallowed collection charges on the amount, which had been realized from the thekedars, but it gave no reasons for disallowing the amount In appeal the Commissioner affirmed the order of the Assessing Authority and the reasons given by the Commissioner, *inter alia*, were that the assessee had actually incurred no expenses as collection charges in collecting money from the thekedars that the estate had taken security from the thekedars mostly in cash and no interest was paid on that cash security and the payment of the *theka* money was more than secured under the terms of the contract, that the

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difference between the gross rental, i e, Rs 24,32 219 and the actual payment to the assessee by the thekadars i e, Rs 20,01,874 represents the commission, and this payment of commission to the thekedars was in fact collection charges which were to the tune of about 15 per cent and the assessee had already benefited by it and, therefore, no further collection charges should be allowed

When the matter was raised before the Board it considered this question in detail After giving the facts about it and also the relevant portion of the *thekenama* and the provisions of the U P Tenancy Act, they were of the opinion that the leases in favour of the thekedars gave them the right to collect rent, and, they were executed in consideration of the rent reserved therein They also held that suits for recovery of rent from such thekadars could lie in the revenue court only, and, therefore they were of the opinion that the amount actually realized from the thekadars was the rent realized under section 5 and the assessee was entitled to collection charges thereon The Board did not agree with the remark of the Commissioner that no expenses had actually been incurred in the collection of the *theka* money, and that it represented the net amount minus the collection charges The Board came to the conclusion that there was nothing in support of this conclusion on the record The estate had to maintain a well paid staff for realizing money even from the thekedars The number of such thekedars was fairly large and there was nothing to show that they themselves came forward regularly to make payments and it appeared that even suits for arrears of rent had to be instituted On these grounds they held that collection charges over this amount should be allowed and it is with that opinion that this reference has come to us

Learned counsel for the assessee has argued that he was entitled to the collection charges on this amount also

Section 2 (1) (a) defines agricultural income , which has been taken from the Indian Income Tax Act of 1922

Agricultural income' means—

(a) any rent or revenue derived from land which is used for agricultural purposes and is either

assessed to land revenue in the U P or is subject to a local rate or cess assessed and collected by an officer of the Provincial Government

We are concerned only with the word 'derived" The word derived , according to dictionary, means to come to cause , to draw to fetch , to obtain ', to get' (from a source or with a source) This clearly means that whatever had been actually obtained or got or received that would be the income and not what one should get or should have realized By no stretch of the language it can be said that the assessee fetched , drew , obtained got or received' from the land which was under the thekedari system more than Rs 20,00 000 odd which is alleged to have been realized by him from the thekedars Under section 2 (1) (*a*) therefore, the agricultural income would be deemed to be rupees twenty lacs and odd The word derived further has been explained in section 5 of the Act, where it has been mentioned that the agricultural income mentioned in clause (*a*) of sub section (1) of section 2 shall be deemed to be the sum *realized* in the previous year on account of agricultural income mentioned in the said clause (*a*) Therefore, by section 5 the meaning that has been given to it is the sum actually realized The word used is realized and not realizable Therefore, the agricultural income of an assessee would be that net amount which he actually realizes or receives and in that case, it is not disputed that the amount that had been realized by the assessee from the thekedari villages was anything more than Rs 20 01,874

Before proceeding further with the discussion of this case, the exact nature of the contract on which the *thekas* were given may also be mentioned here

There is a standard form of *theka* which was in vogue in the estate for a long time The estate at one time was under the management of the Court of Wards and the Deputy Commissioner of Gonda was the Manager and the forms are coming in use since then We have got prepared a translation of that *theka* form The *theka* is on behalf of the assessee on one side and the thekedar

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on the other and the *theka* that had been given was only of the tenancy rights The amount of *sair*, zamindari rights (*haq i zamindari*), and cesses which are realizable by the zamindar from the tenant were still to continue to be realized by the assessee himself and the thekedar had no concern with the same The thekedar was to pay a specified sum in four equal instalments and the dates of the payments were mentioned in the *theka*, and, in case of default, the Thekedar was liable to pay interest at the rate of Rs 6 4 per cent per annum It was further stipulated, that if the Manager of the Balrampur Raj demanded a security from the thekedar in respect of the payment of the said rent or observance of the conditions of the said *theka*, at any time, then it was to be incumbent on the thekedar to deposit the security amount in cash or hypothecate sufficient property or to satisfy in any other manner that the rent would be paid If the thekedar had deposited any security, he was not entitled to get any interest The thekedar was to keep the land cultivated, and if the cultivated area exceeded 10 per cent the thekedar was to pay a specified sum in excess per *kham* bigha every year from the date of cultivation till the time it remained under cultivation No concession was to be allowed to the thekedar in rent unless the cultivated area had decreased by diluvion by more than 10 per cent In case of remissions by the Government, he was entitled to proportionate remissions The thekedar was to realize the rent, whenever payable from the tenants of the said land given to him on *theka*, and, in case the rent of any tenant remained unpaid, the thekedar was to obtain permission of the Manager and file a suit for realization of the rent The thekedar was to give receipts of the realizations made either in cash or in kind and he was responsible to see that the entries in the patwari papers were correctly made and he was to maintain sufficient number of servants for the good management and also for looking after the crops of the tenants There are other conditions in the *theka nama* which are not relevant for the purpose of this case Suffice it to say that the *thekanama* does not talk of any commission which has to be paid to the thekedar on the

realizations made by him The position might have been different if the thekedar was to deposit with the estate the entire amount collected by him and he was paid a certain amount as commission on the realizations Here as it appears from the wordings of the *thekanama*, he was to pay a definite sum irrespective of the fact whether he had realized that amount or not

We cannot forget the fact that the Balrampur Estate of which the assessee is the proprietor is a very huge estate extending over about 1 500 sq miles and the approximate gross rental is about thirty lacs of rupees Further the estate consists also of jungles, and some of the places which were difficult of approach It may have been very inconvenient or at times even impossible to make good collections from the tenants if the estate were to take it upon itself Therefore, with a view to ensure better realizations of the bulk of the amount from the tenants and to minimise arrears in collections and also to make some person responsible, in case the collections are not made properly the system of *thekedari* was introduced The number of thekedars was 10,877 and in some cases though the *theka* has been given in one name it has been contended on behalf of the assessee it actually represented two or more persons because though the *theka* continued to be in the name of the head of the family several members of the family had been realizing separately and making payments separately It was therefore contended that on the sum that had been realized from the thekedars the assessee was entitled to collection charges

It was further contended that for the purpose of the Tenancy Act there is no difference between a tenant and a thekedar Section 2 (23) defines a tenant and section 2 (24) defines a thekadar A tenant is one by whom rent is payable while a thekadar is a farmer or other lessee who gets the right to receive rents and profits Practically tenants and thekadars have been treated as equals under the U P Tenancy Act By section 222 it is provided that every suit or application brought by a thekadar against the lessor or against a thekadar by the lessor which is of the same nature as

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any suit or application specified in the Fourth Schedule, which may be brought by a tenant against a landholder or by a landholder against a tenant shall be deemed to be included in that Schedule under the same serial number as such similar suit or application Again under section 214 among the grounds on which a thekadar is liable to be ejected is the ground that a decree against him for arrears of rent remains unsatisfied It was argued that what a thekadar pays is thus also rent and a decree for non payment of the *theka* money would be deemed to be a decree for rent and, therefore, what had been realized from the thekadars was really nothing else than rent and if it was rent, there seems to be no reason why, for the realization of that collection charges should not be allowed

It was urged that the reasons given by the Commissioner for disallowing this amount are no reasons in law An assessee is entitled by virtue of section 5 (*b*) of the Act to collection charges on the sum realized in the previous year at the rates mentioned therein He is not bound to give details of the expenditure Whether he has incurred more than the statutory allowance or less is immaterial He has been given a statutory exemption up to that rate, and even if he had not produced any account, showing that he had incurred any expenditure on the sum realized, he should have been allowed collection charges We think that the argument of the learned counsel is well founded If the clear and specific words of the statute say that a deduction of collection charges on the sum realized shall be allowed, and that allowance is not dependent on the actual expenses we do not think how the taxing authority can ask for details of the accounts Moreover, it appears that while the case was before the assessing officer he never asked for any details of these accounts Before the Commissioner the account books had been produced and several officers of the assessee had also been examined, but no record whatsoever, was kept of the examination of the records and of the witnesses Therefore, an affidavit was filed before the Board by the general agent of the assessee, wherein details were given about the expenses and it was mentioned therein that actually a sum of Rs 2 05 000 had

been spent in realizing Rs 20 lacs and odd from the thekadars In order to make the realizations there were 13 tahsils and there were 13 sub treasuries in the Thekadari *ilaqa* and in each of the 13 tahsils there was a Tahsildar a Naib Tahsildar in big tahsils a Wasil baqi Nawis and a Siaha Nawis a Mohrrir peshi and a Jamadar with 15 to 20 chaprasis The area scattered was about 1 500 sq miles and it was inaccessible by rail metalled or un metalled roads and expensive measures for transport and armed guard had to be employed in remitting heavy cash balances from the interior to the Sadar Since many of the portions of the estate were uninhabited and were covered with jungle in order to stimulate habitation and cultivation the system of thekedari was introduced The above statements had been made in the affidavit of Sri Vishwanath Prasad general agent of the assessee and they were based on the actual entries in the account books which were also before the Commissioner and could have been produced before the Board also The account books of the estate have been found to be well kept duly audited by chartered accountants and there was no suspicion

As against this affidavit a wholly unsatisfactory affidavit had been filed by one Mahabir Singh who was an Officer on special duty Agricultural Income tax Land Reforms Lucknow In his affidavit he has not given facts but arguments have been incorporated Most of the allegations are on information received There is no mention from whom the information had been received Filing of such affidavits containing arguments and hearsay evidence is to be deprecated If there was any doubt about the facts, either the Commissioner or the Board should have examined the books themselves rather than permitted such a defective affidavit to be filed In the counter affidavit it was said that the sum of Rs 2,05 000, which is said to have been spent on the realizations was not wholly for the realizations from the *taluqdari* villages In the rejoinder affidavit it has been mentioned that Rs 2 05,000 represents the proportionate costs incurred in realizing the money from the *taluqdari* villages and it does not include the expenses incurred by the estate in realizing from the *kham* villages

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We have already said that when the statute does not require that the assessee is to give details of the collection charges nor is it open to the assessing officer to allow more or less than the percentage given in section 5 the assessee was not bound to supply the details of the expenses incurred by him and even if there were no expenses the assessing officer was bound to allow collection charges at the specified rates

The argument of the Commissioner that since security had be n demanded from the thekadars the collection charges were disallowed does not appear to be correct. Under the *theka* it was only those thekadars from whom the Manager chose to demand security not all who were to deposit security and even if security was taken that did not deprive the assessee of the collection charges Allowance of collection charges is not dependent on the fact whether collection is ensured or not

Learned Counsel for the State has argued that commission which had been paid was actually the collection charges and therefore if once the assessee has got benefit of the collection charges, he should not be given double benefit We are unable to agree with this argument As we have given a precis of the relevant portion of the *thekanama*, we do not think, that there is any question of any commission It may be that the assessee by giving the *theka* was content with receiving a lesser amount though a surer amount The extra amount if any charged by the thekadars would not be the collection charges It may be that some of the portion may remain unrealized If there is a shortage of land up to 10 per cent by diluvion the thekadar was to suffer Therefore to call the difference between the gross rental realizable from the tenants and the amount paid by the tenants to the thekadars a commission or a collection charge is a misnomer The assessee may have thought that if he makes collections himself he may have to incur far greater expenses than in getting the collections made through the thekadars As a matter of fact it had happened that when the collections have been made directly from the tenants they have been much less than what they had been when made through the thekadars

In the year 1355 Fasli the total collections from the *khair* villages and from the taluqdari villages came to Rs 30 02 097 while in the years 1356 Fasli and 1357 Fasli they were Rs 29 23 931 and Rs 29 52 068 respectively In the latter two years the collections had not been made through thekedars but were made directly Thus in one year about seventy thousand rupees and in the other about fifty thousand rupees less were realized

We have already held that what the thekadars kept as their profits was not the collection charges so far as the assessee is concerned but even if, for argument s sake we accept that those were the collection charges which had been paid by the assessee he would under section 5, be entitled to claim collection charges on the amount *realized by him* even though it might amount to double advantage Under a taxing statute, an assessee cannot be deprived of the advantage if he can have on the wordings of the Act even if it results in such an advantage It is only, if it results in double taxation, that the law is to be interpreted very strictly and there should be a presumption that the law never intended to tax an assessee doubly

After considering all the facts of the present case and the clear and unequivocal wordings of section 5 we are clearly of the opinion that an assessee is entitled to collection charges on the sum realized by him whether it is realized directly from the tenants or through the thekadars Section 5 does not specify that the realizations on which collection charges would be allowed should be from the tenants and not from the thekadars If we were to import the words from tenants after the words the sum realized , we will be importing something which is not in the section and stretching the language in favour of the State which we are not entitled to do in a case of fiscal legislation Even if both the interpretations were possible which we do not think is possible under the clear and explicit language of the section we would be inclined to give an interpretation which was in favour of the subject rather than in favour of the State

We accordingly answer this point in the affirmative

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Question no 2—Whether the sale proceeds amounting to Rs 27 419 9 6 of the old grain stock sold during the previous year be included in the agricultural income of the assessment year 1355 Fasli?

There was grain, worth the above amount, lying in the stock of the estate in the beginning of the year When the return was filed this grain was included in the form submitted by the assessee, but later on he made an application that since this produce was of the last year, he was not liable to pay any income tax over the sale of this produce The Assessing Officer allowed the prayer of the assessee and excluded Rs 27 419 9 6 from the sale proceeds of the year 1355 Fasli Before the Commissioner an objection was taken on behalf of the State that this should not have been excluded Originally the figure under section 6 (2) (*b*) was Rs 2,85,765 6 3 but subsequently this figure was changed to Rs 2 08 345 12 9 on the ground that a sum of Rs 27 419 9 6 had been wrongly included for the price of the old grain stock in hand The Commissioner held that the Deputy Commissioner, i e the Assessing Officer, had accepted the subsequent figure without giving any reasons for it and he did not agree with the Assessing Officer that the subsequent figure should be taken to be as the gross income under this head He was of the opinion that even accepting the statement of the general agent the sum of Rs 27,419 9 6 still remained an income under section 6 (2) (*b*) This was brought from the last year and prior to 1355 Fasli there was no tax therefore, no tax had been paid on this amount and tax should be paid in 1355 Fasli on this agricultural income also When the matter went up before the Board the Board agreed with the opinion of the learned Commissioner that the amount in dispute should be added On behalf of the assessee it has been argued that the opinion of the Commissioner and the Board is incorrect It has been contended that under section 6 it is only the produce of that year which is liable to tax and it is also the expenses of that year which are allowed In the present case so far as the expenses incurred for earning Rs 27,000 odd of the previous year are concerned, they would not

be allowed, but the net proceeds of the sale would be taken as profits which will be wholly inequitable It cannot be said with any reason that the produce of Rs 27,000 odd was obtained without incurring any expenses and if the expenses which are provided under section 6 for earning, are not allowed the produce itself also should not be taken into account We agree with the argument of the learned counsel for the assessee Learned counsel for the State has not been able to show us how this produce would be the produce of that year

Computation of agricultural income is to be in accordance with sub section (1) of section 2 where agricultural income has been defined If it is rent or revenue derived from the land it will come under clause (a) If it is an income derived from such land by agriculture, then it would come under clause (b)

So far as the income of the produce is concerned it would be an income derived from land by agriculture Income under clause (a) is to be taxed under section 5, while the income under clause (b) is to be taxed under section 6 of the Act As regards the interpretation of section 6 we have already said what the word 'derived' means In the present case we are concerned with the interpretation of the words any income derived from such land by agriculture

The assessee has in his statement filed for each of the different years shown the value of the total produce of the grain of that year and the value has been calculated at the market rates irrespective of the fact whether the produce has been sold or not There does not appear to be any dispute on this point of fact Therefore if the assessee has shown the total value of the produce of 1355 Fasli in the returns submitted by him, there was actually some quantity of grain which was produced in the year 1355 Fasli but was not sold and that was not carried over next year If that was so, and the total produce has been taken into account then it can be only of one year and not of 1355 Fasli and any part of 1354 Fasli When section 2 uses the words any income derived from such land by agriculture it means any income derived during the year

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This point is quite clear from sub-section (3) of section 6 which reads as follows

> If the assessing authority is satisfied that the proceeds of sale have not been correctly shown by the assessee or that any portion of the produce has not actually been sold he may assess the value of the produce for purposes of clause (b) of sub-section (1) of section 2 by determining to the best of his judgment, the amount of produce and the market value thereof

This section clearly shows if part of the produce has been sold the value of that produce will be taken as income, and as regards the balance the assessing authority shall determine the value to the best of his judgment. In case no sales have been effected it will be the value of the total produce according to the best judgment If the whole produce of the year has been sold, and the assessing authority is of the opinion that the amount shown is correct then the sale proceeds of the total produce of that year would be taken to be the amount as profit Rule 15 of the U P Agricultural Income tax Rules can be cited in support of the above proposition, which runs as follows

> 15 In determining the amount of produce and the market value thereof under sub-section (3) of section 6 the assessing authority may take into consideration
>
> (i) the account books if any, kept by the assessee in the regular course of business
>
> (ii) the average yield for the crop reported in neighbouring areas, having regard to the class of soil and the situation thereof
>
> (iii) the average prices during the year for such produce in the nearest market

From the above rule it is apparent that what the Legislature wanted was the value of the yield of the accounting year and it was not the actual sales which were to be taken into consideration

We are therefore, clearly of the opinion that the Commissioner has erred in including this amount in the total agricultural income of the assessee and this amount should be excluded The opinion of the Board when it agreed with the Commissioner was also wrong

We would therefore, answer the question in the negative

Questions 3 and 6—The third and the sixth questions which have been referred to us appear to be connected and both of them are on the interpretation of section 5 (*d*) of the Act These questions are

> (3) (*a*) Whether the tube wells and other irrigation works were constructed by the assessee for the benefit of the land?
>
> (*b*) Is he entitled to a deduction of such expenses
>
> (6) Whether the amount spent on repairs and maintenance of pathways and roads in the *ilaqa* of Balrampur Estate are expenses incurred on the construction or maintenance of any irrigation productive or protective work constructed for the benefit of the land from which agricultural income is derived within the meaning of section 5 (*d*) and section 6 (2) (*b*) (v)?

The relevant portion of section 5 of the Agricultural Income Tax Act reads as follows

> 5 The agricultural income shall be deemed to be the sum realized after making the following deductions
>
> (*d*) any expense incurred in the previous year on the construction or maintenance of any irrigation productive or protective work constructed for the benefit of the land from which such agricultural income is derived

There is a very similar provision in section 6 of the Act and on the basis of that actually question no 6 arises The relevant portion of section 6 is as follows

> 6 (*b*) The income shall be the gross proceeds of sale of all the produce of the land subject to the following deductions

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(v) any expenses incurred in the previous year on the construction or maintenance of any irrigation productive or protective work constructed for the benefit of the land from which the agricultural income is derived '

From the language of these two sections it will appear that the language employed in both the sections is identical and the question is why was it necessary for the Legislature to enact two different sections Section 5 of the Agricultural Income Tax Act has been enacted for the determination of the agricultural income, and it speaks of that income which has been realized as rent, land revenue local rates cesses and taxes, while section 6 refers to computation of agricultural income of the land which is actually in the cultivation of an assessee, and the gross proceeds of sale of all the produce of the land to be assessed subject to certain deductions By introducing the two exceptions in both the sections, the object of the Legislature was whether the land was in possession of the tenant or in possession of the assessee himself, in either case, the assessee would be entitled to a deduction of the amount which he had incurred in construction and maintenance of any irrigation, productive or protective work constructed for the benefit of the land The most important question for consideration is about the meaning of the words irrigation productive or protective work constructed for the benefit of the land

Under this head there are two kinds of items Some amounts have been spent on the maintenance and construction of the tube wells canals, etc During the year 1355 Fasli the mount spent was Rs 1,86 724 14-3, in 1356 Fasli it was Rs 1 86,725, while in 1357 Fasli it was Rs 1,84 757 6 3 The assessing authority had allowed these expenses The Commissioner disallowed them, *inter alia* on the ground that these works had actually not resulted in any productive or protective results It is really the intention of the assessee, which matters, and not the finding of tha Income tax Department

As there was no comma between the word "irrigation" and the words 'productive or protective', therefore, in

the opinion of the Commissioner the words productive or protective were qualifying words for the word irrigation Since the Raj was also charging for the water supplied by them through these canals therefore, it was said that it was more of a business nature than an agricultural income The Commissioner was further of opinion that as a matter of fact, these constructions have not in any way increased the rent, and therefore it could not be said to be productive and, lastly, he had held that since such work should be interpreted to benefit both the landlord and the land, and if the landlord has not been benefited thereby it could not be said to be a productive work The Board gives its opinion in favour of the assessee and has come to the conclusion that they are of productive and protective nature According to them what was necessary was that such work, even if it is for irrigation purpose only must be for the benefit of the land, from which agricultural income is derived, and as it was not disputed that the tenants used to take water for irrigating their fields, therefore, it necessarily followed that it was for the benefit of the land The Board was also of the opinion that the words productive or protective were not the words qualifying irrigation but they are separate words which qualify the word work They were of the opinion that it was unnecessary for the purpose of this case to go into the question, whether there was actually any increase in rent on account of such irrigation facilities

What we have to consider is whether the works were for the benefit of the land

As regards pathways which are involved in question no 6 a sum of Rs 37,497 2 6 had been spent, which was allowed by the assessing authority, but was disallowed by the Commissioner and has also been disallowed by the Board on the ground that these constructions were not of the nature as specified in section 5 (*d*) or in section 6 (2) (*b*) (*v*) On behalf of the income tax authorities it was urged that there being no comma between the word irrigation and the words 'productive or protective', it should be deemed that the words productive or protective are qualifying words for irrigation and

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each of them is not qualifying the word work According to the counsel, the work should primarily be of irrigation nature and then further it should be productive and protective i e, the work should both be irrigation work as well as either productive or protective We are unable to agree with this contention Usually adjectives are put before the noun they qualify, and it is very rarely that they follow the noun, and if they do follow, they are often separated by a hyphen In the circumstances, it cannot be said that the words productive or protective are qualifying words of irrigation' and since they have been placed before the noun work, they should be taken to be qualifying the noun work rather than the word irrigation If we take these words in this order, it will be clear that the work should be irrigation work or productive work or protective work

The argument of the learned counsel for the State based on the absence of commas is also not tenable because of the fact that punctuation was no part of the statute and that it was an error to rely on punctuations in construing Acts of the Legislature This has been so held by their Lordships of the Privy Council in *Mahrani of Burdwan* v *Krishna Kamini Das* (1) Following this decision of the Privy Council, practically every High Court has held that punctuation not being a part of the statute to be construed is not the determining factor and the court should not take it into consideration in interpreting statutes We need cite authorities only of our Court Suffice it to say that among the cases are *Nias Ahmad Khan* v *Pursottam Chandra* (2) and *L Mansa* v *Mst Ancho* (3) If we take that the words productive or protective qualify irrigation, then we will have to assume that there can be irrigation work of some other character also but we do not think that, if there is any irrigation work, it could be anything except either for productive or for protective purpose and therefore the Legislature would be deemed to have used superfluous words, if we do not treat the words productive or protective separate from the word irrigation It would

1 (1887) I L R 14 Cal 365 372 2 A I R 1931 All 154
3 A I R 1933 All 571

be, in our opinion, leading to an absurd interpretation and in cases where on account of want of punctuation the result is such the court should avoid putting that interpretation In suitable cases it is open to a court for the purpose of interpretation either to disregard the punctuation of the statute or to punctuate it properly and give its proper meaning We are therefore of the opinion that the words irrigation productive or protective are all independent of each other and a work, which is either for irrigation or productive or protective, will be covered by these two sections

The next question that arises is whether the Commissioner was correct when he held that there had been no evidence of the fact that they had actually resulted in benefit to the land or not It is not the actual result with which we are concerned The Dictionary meaning of the word productive is having the quality of producing , tending to produce , creative , generative", that produces or increases wealth or value Similarly, the word protective has the following Dictionary meaning protecting tending to protect defensive preservative From the meaning of these two words it is clear that the work would be productive or protective either if it actually results as such or it tends to be such It is not necessary that in every case it must result in actual gain If the work is such that it increases the value of the land it will always be of a productive nature In Economics the word productive actually means increasing the utility of a substance and if the utility of a land is increased by having some work on it it would be of a productive nature The canals, which had been built had been built actually before the assessment years and most of the amounts were spent on maintenance but there were also certain further constructions It cannot be said that the canals which were providing more water and irrigation facilities to the tenants were not for the purpose of benefit of the land Similarly the expenditure incurred on the roads and pathways, which had been built and which had been maintained actually on the land, as distinct from the expends-

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ture incurred by the Maharaja on his residential buildings or on non agricultural land, would again be a productive and protective work for the benefit of the land If roads are constructed or maintained, there is always better means of transport and greater facilities to the tenants for carrying manure, ploughs to their fields and their produce from the fields These roads further when constructed make the estate less liable to attack from wild animals As we have said earlier in this judgment, the estate extends to over 1 500 sq miles and there are good many villages, which are in the interior and access to them is also dangerous Therefore, the roads and pathways, which have been constructed and maintained, could be for no other purpose but for the benefit of the land

In order to find out whether any expenditure comes under this head or not there are two things which are necessary (1) whether the work is either for the purpose of irrigation or productive and protective, and (2) whether it was for the benefit of the land, i e , whether it increases or tends to increase the utility and the value of the land If these two things are present in our opinion the expenditure would be exempted under this head, whether it results in extra income or not is immaterial

We, therefore, agree with the opinion of the Board on question no 5 and disagree on question no 6 and we would answer both parts of question no 3 and question no 6 in the affirmative

Questions 4 and 7 to 11—Question no 4 and questions nos 7 to 11 all relate to rule 17 of the Rules framed by the State Government under section 44 of the Agricultural Income Tax Act Therefore, we propose to take all these questions together

These questions are

(4) Whether rule 17 framed under the Agricultural Income Tax Act goes beyond the scope of section 8 and is it *ultra vires?*

(7) Whether exemption can be allowed in respect of such expenses under rule 17?

(8) Whether the Explanation to rule 17 is controlled by the rule itself or is it to be interpreted and applied independently of the rule?

(9) Whether the hospitals which were subject to general inspection by the Civil Surgeon can be treated as hospitals in receipt of a grant from the Government within the meaning of the notification issued under rule 17?

(10) Whether scholarships paid to students were donations to an institution or fund within the meaning of rule 17?

(11) Whether the amount paid to an institution earmarked for scholarship can be treated as donation to the institution within the meaning of rule 17, or can the institution on that ground be treated as an institution aided by the Government within the meaning of rule 17?

The assessee claimed donations under this rule to the tune of Rs 4 29 765 13 9 in the year 1355 Fasli, Rs 3,23 146 in the year 1356 Fasli and Rs 2 41 155 in the year (sic) 1357 Fasli The assessing authority had allowed a sum of Rs 5,23 146 Rs 2,65 576 and Rs 1,43,485 in the three respective years When an appeal was filed by the assessee against the assessment order the Officer on special duty, on behalf of the Agricultural Income tax authorities, raised objection to the different items of donations allowed After considering these objections the Commissioner allowed Rs 1,48 707 1 5 Rs 2,08,523 6 6 and Rs 1,77 847-2 6 in the respective years Before the Board again objections of the Officer on special duty were pressed and after considering the arguments, the Board remanded the matter, after giving certain directions to the assessing authority After the receipt of the findings on remand the Board considered and allowed Rs 55 760 11 8, Rs 55 984 12 8 and Rs 41,873 1 1 for the three years 1355, 1356 and 1357 Fasli respectively and disallowed the balance On these findings the assessee raised certain questions which are the questions referred to above under this head

Before the Board the first time on behalf of the State it was urged, that rule 17 was beyond the scope

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of the rule making power of the State and therefore it was *ultra vires*, and on that ground it was contended that any donations of any kind whatsoever could not be exempted The Board has not expressed any opinion on this question and has merely contented itself by saying that it found itself in a difficult position particularly on account of the fact that exemptions in accordance with rule 17 had been allowed to all the assessees without any objection by the State The question being one of law they have therefore referred it to this Court and thus question no 4 has been referred to this Court about the validity of that rule

It was argued on behalf of the assessee that we should answer the question in the negative It was contended, *inter alia*, that this point should not have been allowed to be raised by the State for the first time before the Board and secondly in any event it is valid under section 44 It was also contended that since it is the action of the State on account of which these donations had been paid and the assessee would suffer a loss on account of the action of the State itself and therefore an interpretation should be put on the *vires* of the section, which would result in lesser injustice to the assessee

Learned counsel has placed reliance on the case of *T B Ibrahim* v *The Regional Transport Authority, Tanjore* (1) It was a case under the Motor Vehicles Act wherein, a rule had been framed about certain notified stands and the question was whether the Motor Vehicles Act permitted the framing of such rules Under Chapter IV of the Motor Vehicles Act the Provincial Government was invested with preliminary powers to make rules for carrying out the purpose of that Chapter The purpose of the Chapter was the control of transport vehicles Again section 68 (2) (r) had clearly contemplated three definite situations It prohibited the picking up or setting down of passengers at specified places, in specified areas and at places other than duly notified stands or halting places On these facts their Lordships of the Supreme Court held, that since

1 A I R 1953 S C 79

the rule was made to carry out the purpose of Chapter IV it was within the jurisdiction of the Provincial Government to make that rule and the rule was also within section 68 (2) (r)

In the Agricultural Income Tax Act, the rule making power has been given to the State Government under section 44 Sub section (1) of section 44 reads as follows

> The State Government may make rules for carrying out the purposes of this Act

In our opinion the words carry out mean to carry into practice, i e, to make practical rules by means of which the Act could be brought into force It would, in our opinion, enable the State Government to make such rules which might prescribe as to how the returns are to be made, where and to whom they are to be made and all details of procedure necessary for giving effect to the general principles enacted under the Statute itself The words carrying out the purposes of this Act really mean authorizing the State Government to make procedural or adjective law as distinct from substantive law, which either takes away or confers vested rights Sub-section (2) of section 44 gives rather details of those items on which the State Government is authorized to make substantive law

In recent times the tendency of the modern legislation has been to lay down general principles and to avoid going into the administrative or practical details It is within the competence of the Legislature to do so The law thus made by the delegated authority, be it may, the State Government, the High Court, the Municipal authorities or any other autonomous body, is known as a statutory instrument or administrative law But there are certain safeguards which have to be observed in delegating this power So far as the procedural power is concerned, it can be given without any reservations and, therefore usually the first clause of the rule making section is always in general terms and authorizes an authority to make rules to carry out the purposes of the Act, but where besides the power of making the Act practicable other powers are given, they are always specified

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usually in the enabling section. The first power, according to us had been given in sub-rule (1), and the second under sub-rule (2). We are unable to agree with the argument of the learned counsel for the assessee that the first power also includes the power, which could affect the substantive rights of the parties.

There cannot be any doubt that rule 17 cannot be called a procedural rule. It exempts certain income from being taxed. If, for example, a certain income which was not taxable under the Agricultural Income Tax Act, was made taxable, objection could be raised that it had affected vested rights. Similarly, if there is no exemption provided and an exemption is added by the rule, it will also affect the right of the other party and there would be a confirment in the right of the assessee.

It is well settled principle of constitutional law that a legislature cannot delegate its essential functions. The legislative policy regarding a legislature must be clearly and explicitly explained in the statute itself, but when such powers are delegated, they should be canalized and be within limits. Certain details, e.g., fixing the maximum rate of imposition of a tax, authorizing the executive to determine the rate or water rate for the supply of water, irrigation, etc., can all be delegated to a subordinate authority. Here it is admitted that so far as sub-section (2) is concerned, no sub-clause of that section can be cited for the purpose that rule 17 had been framed under that clause. No clause covers it. Therefore, the counsel for the assessee had to rely on sub-section (1), which, as we have already said, would not apply to a rule like rule 17, which, in our opinion, is not a procedural law for carrying out the purposes of the Act.

Lastly, it was urged that at this stage since this rule had been placed before the Legislature and the assessee acting upon that representation had incurred those expenses, some of those expenses being also connected with the Government, therefore, all the past actions, under the *bona fide* belief that the law was *intra vires*, should not be allowed to be touched. It was contended by the assessee that if this rule had not been framed it

may be that the assessee would not have incurred some of those expenses. Reliance was greatly placed on the fact that since these rules had been placed, as required by sub-section (3) of section 44, before the Legislature, and there was no annulment or modification by the Legislature therefore, they should be deemed to have been framed with the approval of the Legislature.

Maxwell in his well known book on "The Interpretation of Statutes" 10th Edition at page 50 has observed as follows:

> Instruments made under an Act which prescribes that they shall be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House, but that if not so annulled they are to be of the same effect as if contained in the Act, and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act. If there is a conflict between one of these instruments and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with.

Therefore, it was argued that the rules having not been annulled by the Legislature, they should be deemed to be a part of the Act.

It is true, that if a rule or regulation properly made had been laid before the Legislature, it would take effect, as if it were a part of the Act, and it will have the same sanctity or force as any other section of the Act. But if the rule itself was beyond the competence of the rule making authority, in that event, should sanctity be given to the rule, is the real question that arises in the present case. We think that, strictly speaking, that would not be permissible.

Though it may be so, yet there are certain considerations, on account of which, we think that in the present case, we should deem it that this legislation had been a proper legislation, till it is declared *ultra vires* and any benefit that had accrued before that date to an assessee

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could not be taken away from him We will deal with those considerations later

The reference on this question has been made to this court under a wrong apprehension The Board considered that the exemption section in the Act was section 8 That section is not a section which exempts a certain income of an assessee It is a section of exclusion", i e, the income derived from a property held under trust or other legal obligation would not be taxable at all In other words, when a property is held by such a trust, the trust is not liable to pay any income tax and would not be an assessee at all Therefore such a trust has been excluded entirely from the purview of the Agricultural Income Tax Act Exemptions, which are really exemptions, have been mentioned in sections 5 and 6 themselves Therefore, so far as rule 17 is concerned, it was neither framed under section 8, nor has it any affinity to that section

Crawford in his book The Construction of Statutes, 1940 Edition, at page 393 has observed as follows

> Where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long period of time, and generally or uniformally acquiesced in, it will not be disregarded by the courts, except for the most satisfactory, cogent or impelling reasons In other words, the administrative construction generally should be clearly wrong before it is overturned Such a construction commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight It is highly persuasive
>
> And where vested rights have grown up under the departmental construction, the courts are justified in being more reluctant than in ordinary cases in adopting a construction which will destroy or disturb such rights A similar reluctancy is also proper where a departure from the executive interpretation will result in injustice

It is on the principle enunciated above that we feel reluctant in declaring at this stage a rule as *ultra vires*, which has been made by the Government and which has been acted upon for a considerable length of time and has also been applied in the case of every other assessee, and, which, if declared *ultra vires*, would result in great injustice to the present assessee, and under the circumstances, we are inclined to take the view that as, on a representation of the State Government, the assessee acted *bona fide* in giving certain donations, the State would be precluded from charging any income tax over such donations which the assessee has *bona fide* paid in pursuance of rule 17. This interpretation is in no way inconsistent with any part of the Act. The declaration of the rule *ultra vires* at this stage would be very hard and oppressive to the assessee.

Learned counsel for the assessee had relied on *Corporation of the City of Quebec* v. *Quebec Central Railway Co.* (1). That was a case where on a wrong representation made by a company, the Parliament had passed a certain law and the court held, that, in those circumstances since the law had been brought about on a wrong representation by the company, therefore, the company could not be allowed to say that the law was wrong or *ultra vires*. To a certain extent, this authority supports the proposition of the assessee, that the State Government should not now be allowed to raise the plea of *ultra vires*, when it is on its own representation that rule 17 was framed. But there is also a little difference. There in the Canadian case, misrepresentation was as to a certain fact but here if the power has been exercised it has been exercised under a mistaken view of the law. If in the present case, it was the misrepresentation of the fact alone, then section 115 of the Evidence Act would have applied and we would have not allowed that point to be raised by the State at all.

In the Tagore Law Lectures Sri S. R. Das's Law of *ultra vires* in British India at page 202 it has been mentioned:

> When *ultra vires* transactions have been completed, then as between parties to them and the

1. (1884) 10 S. C. R. of Canada, 563, 610 and 614.

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corporation, the matter is absolutely ended for all purposes and no further claim can exist on the part of the one against the other."

It was contended that here so far as the payment of donations under that *ultra vires* rule having been made and the transaction completed were concerned at this stage the State should be bound. We agree with this contention.

Thus, in our opinion, if a rule has been made by the State purporting to be within its powers for the benefit of the subject, and acting on the basis of which the subject has incurred liabilities and entitled himself to a benefit, the State on its own motion cannot ask the court to have the law declared later on as *ultra vires*. The law, in that event, should be interpreted in favour of the subject and in a way that lesser injustice results from its interpretation. Therefore, so far as the past transaction is concerned the rule would be deemed to be effective.

We would answer *question no.* 4 not in the simple affirmative or negative but we would say that rule 17 was not purported to have been framed under section 8 but it had been made under section 44 and it having been laid before the Legislature and having been acted upon *bona fide* by the assessee, who had derived advantage, it is not now open to the State to have the law declared *ultra vires* retrospectively to affect the past and completed transactions having taken place on the basis of that rule. The answer may have been different if no benefit to the subject had accrued and the State had derived unfair benefit by means of the *ultra vires* rule.

Question no. 7 appears to refer to expenses mentioned in *question no.* 6. We have already held that repairs and maintenance of pathways and roads could be allowed under section 5 (*d*), and section 6 (2) (*b*) (*v*) and therefore, *question no.* 7 does not need any further answer.

Question no. 8 relates to the scope of rule 17. Rule 17 reads as follows:

> 17. Sums paid by an assessee as donations to any institution or fund which is established in Uttar

Pradesh for a charitable purpose and is approved by the State Government for the purpose of the rule shall be exempt from liability to agricultural income tax

Provided that the total of the sums so paid is not less than Rs 250

Provided further that nothing in this rule shall be deemed to entitle a person to claim any exemption in respect of any sum referred to in this rule if it was exempted from income tax under the Income Tax Act, 1922

Explanation—In this rule charitable purpose includes relief of the poor education, medical relief and the advancement of any object of general public utility

The assessee wants to interpret this rule to mean that in order to avail of the advantage of this a fund or institution to which a donation is given should be either charitable as explained in the Explanation or approved by the State Government Therefore, even if a school, a hospital or any other charitable institution is not recognized by the State Government or approved by it for the purpose of this rule, it could be included in rule 17

It was contended that the word and in the rule can be read as or and there is ample authority for the proposition that the word and and or are interchangeable and reliance was placed on Maxwell s Interpretation of Statutes, 10th Edition, page 238, where it was observed

> To carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions or and and one for the other "

The same author at page 239 has also observed

> This substitution of conjunctions, however, has been sometimes made without sufficient reason, and it has been doubted whether some of the cases of turning or into and, and *vice versa*, have not gone to the extreme limit of interpretation

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Reliance was also placed on Crawford's book, "The construction of Statutes", 1940 Edition, page 323, paragraph 188:

> In ordinary use the word "or" is a disjunctive that marks an alternative which generally corresponds to the word "either". In face of this meaning however, the word "or" and the word "and" are often used interchangeably. As a result of this and careless use of the two words in legislation there are occasions when the court, through construction, may change one to the other.

But Crawford in the same paragraph observes:

> This cannot be done if the statute's meaning is clear or if the alteration operates to change the meaning of the law. It is proper only in order to more accurately express or to carry out the obvious intent of the legislature, when the statute itself furnishes cogent proof of the error of the legislature and especially where it will avoid absurd or impossible consequences or operate to harmonize the statute and give effect to all of its provisions.

In our opinion "and" should be read as "and" and "or" as "or" ordinarily and unless there are strong and sufficient reasons to read one for the other, it is not open to a court to treat them as synonyms. "And" is used generally in a conjunctive or cumulative sense requiring the fulfilment of all the conditions that it joins together, while "or" is a disjunctive conjunction equivalent to the word "either" and is antithesis of "and". We do not think that in the present case any such reasons exist. Neither there is any rule of grammar, because of which we should make this change, nor would it be inconsistent with the scheme of the Act. If we strictly follow the dictionary meaning of the word "and" instead of being destructive of the object of the enactment it would really be in consonance with its purpose. We, therefore, cannot accept the argument of the learned counsel for the assessee that the word "and" should be read as "or".

It was argued that if it was not so, why an Explanation was at all added The Explanation begins with words in this rule Therefore instead of the words charitable purpose in the rule we should substitute the definition of charitable purpose as given in the Explanation To our mind there may be some doubt about the charitable nature of some of the institutions which are for education medical relief or for the advancement of any object of general public utility, and therefore in order to make it clear the Explanation was added It appears that it was added more for the guidance of the State Government when giving approval under rule 17 to an institution or to a fund If we were to accept the argument of the learned counsel for the assessee that a charitable purpose need not be approved by the State Government, then the words and is approved by the State Government for the purpose of the rule would be redundant unless we are to suppose that it was open to the State Government to approve some fund or institution which was not at all for a charitable purpose A law should be so interpreted that it should not impute redundancy to the Legislature or to the rule making authority

It was also argued that the words approved by the State Government refer only to a fund and not to an institution because the words institution and fund were separated by the disconjunctive or We are unable to accept this argument In that event, even the words charitable purpose would govern only fund and if we were to accept this argument of the learned counsel, it would mean that any donation can be paid to any institution of any kind whatsoever whether it was charitable or not and it was only when it was paid to a fund that it should have been established in Uttar Pradesh for a charitable purpose or approved by the State Government for the purpose of the rule That would frustrate the object of the Act itself and that could not possibly be the intention of the rule making authority

It may be mentioned that this rule is practically a verbatim copy of section 15 B of the Indian Income tax Act as it stood before the present amendment There

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instead of the fund or the institution being approved by the State Government, it was the Central Board of Revenue which used to approve the fund or the institution

In order to support his argument the counsel for the assessee has urged that some of the institutions which have been approved by the State Government in its notification no 374/I C, dated 18th February, 1949, are not for a charitable purpose, and among them it was argued Gandhi Memorial Fund and Rishi Valley Trust, Banaras, are such institutions Gandhi Memorial Fund is being collected for the advancement of the object of general public utility and Rishi Valley Trust Banaras, is a trust which is running several educational institutions of good standard and, therefore, it cannot be said that these two institutions are not for charitable purpose especially within the meaning of the Explanation They may not be for a charitable purpose within the commonly misunderstood meaning of charity, which only includes giving money to beggars, but they are certainly within the meaning of charitable purpose as defined in the rule

It was also argued by the learned counsel for the assessee that if every charitable institution has to be approved by the State Government, there is likely to be an anomaly between this rule and section 9 of the Agricultural Income Tax Act Section 9 of the Agricultural Income Tax Act relates to exemption of income from *waqfs* from tax and is in the following words

> Income derived from a trust referred to in section 3 of the Mussalman Waqfs Validating Act 1913 commonly known as *waqf alal aulad* shall be assessed as income of one individual provided that the part of the income actually spent on public charitable purpose shall be exempt from liability to tax

It was argued that in this section there is no provision as to what charitable institutions would be exempted The difference is that in that case, if the creator has created any charitable institution and it comes within section 3 of the Mussalman Waqfs Validating Act, 1913, that institution would be deemed to have been approved by

means of this section, and, to us, there does not appear to be any conflict

We, therefore, answer the first part of question no 8 in the affirmative and the latter part in the negative, i e, Explanation to rule 17 is not to be interpreted and applied independently of the rule and the Explanation to rule 17 is controlled by the rule itself

Question no 9 relates to hospitals which were subject to general inspection by the Civil Surgeon and it was contended on behalf of the assessee that such institutions will come within notification no 374/I C dated 18th February 1949, which is in the following words

> In exercise of the powers conferred under rule 17 of the rules framed under the U P Agricultural Income Tax Act, 1948, published with the notification no 374/I C, dated 18th February, 1949, the Governor is pleased to approve for purposes of that rule the following funds and institutions which are established in Uttar Pradesh for a charitable purpose
>
> (1) Gandhi Memorial Fund,
>
> (2) Harijan Ashram Allahabad
>
> (3) Ram Krishna Mission Sewashram, Vrindaban
>
> (4) Rishi Valley Trust Banaras
>
> (5) all educational institutions recognized by the State Government or a local authority,
>
> (6) all hospitals, sanitoriums or clinics established in Uttar Pradesh which are in receipt of a grant by the State Government or a local body, and
>
> (7) any other institution which may, on the application of the assessee or the institution, be approved by Government from time to time

Learned counsel for the assessee had first raised an objection that this point has been raised not at the instance of the assessee but by the Board itself and there was no jurisdiction in the Board to raise that point Reliance was placed on section 24 of the Act It was

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contended that the reference had been made under section 24 (2) by the assessee and, therefore, the reference could only be made on a ground raised by the assessee and no new ground could be raised by the Board The argument was that section 24 (2) is very similar and almost equivalent to section 66 (1) of the Indian Income Tax Act and under that Act it has been held that there could be no reference except on the application of an assessee Section 66 of the Income Tax Act is not equivalent to section 24 of the Agricultural Income Tax Act There is sub section (1) in section 24 of the Agricultural Income Tax Act which has no equivalent and parallel enactment in section 66 Section 24 prescribes a reference by the Board *suo motu* on their motion or a reference from any assessing authority subordinate to the Board apart from a reference on the motion of the assessee as provided under sub section (2) Therefore we do not propose to deal with the authorities under section 66 of the Indian Income Tax Act When this fact was pointed out to the learned counsel for the assessee it was argued that sub section (2) supersedes sub section (1) and when an application is made by an assessee under sub section (2), the power to refer *suo motu* any question comes to an end We are wholly unable to agree with this contention The two powers in sub section (1), sub section (2) of section 24, are wholly independent of each other The power under sub section (1) to refer a question *suo motu* can always be exercised irrespective of the fact whether any reference has been made under sub section (2) or not

Moreover, it appears that this question actually had been framed on the application of the assessee himself When the case had come back after remand with findings from the Assessing Authority, an application was made under section 24 (2) to the Board praying, *inter alia*, that the following question be referred to the High Court

> Whether the exemptions allowed by the Commissioner of Agricultural Income Tax were allowable under the Act read with the rules framed there under and was the Board right in dissenting from the view taken by the Commissioner ?

The view that the Board had taken before remanding the case to the Assessing Authority was that the hospitals which were under the general inspection by the Civil Surgeon could not be treated as hospitals in receipt of a grant. The Board was of the opinion that the grant should be in the shape of a monetary grant when it would come under item no. 6 of the notification dated the 18th of February, 1949. Therefore this question actually arises from one of the questions which was desired by the assessee to be referred to this Court.

Objection was also taken that the Board has made a mistake in not referring all the material questions that arose under the question which was desired to be referred by the assessee. If there was any omission, it was open to the assessee to apply to the Board to refer such other and further questions, which arose in the case and if those questions had been refused to be referred to this Court, the assessee should have come to this Court and asked for a statement on those questions.

If this had not been done by the assessee, he cannot be permitted at this stage to say that certain questions which did arise have not been referred and, therefore, this Court should also frame the questions itself and answer them.

Kanga in his book, The Law and Practice of Income Tax, Volume I, 1959 Edition, at page 855 has collected decisions regarding the question which should be answered by the Court. He has summarised it in this way:

> It is clearly established by decisions of the Privy Council that the High Court can answer only those questions which are actually referred to it; it cannot raise and answer new questions which have not been so referred.

We may be able to re-frame a question and recast it but it will not be possible for us to frame an entirely new question and answer it.

On the merits it was argued that the Civil Surgeon had been inspecting these hospitals and the assistance of Civil Surgeon is taken in appointment of doctors and also in indenting medicines and that travelling and daily

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allowances of the Civil Surgeon had not been paid by the estate but was paid by the State and therefore it was contended that the travelling and daily allowances paid to the Civil Surgeon should be deemed to be a grant to the hospitals within the meaning of item no 6 of the above notification It was contended that the word grant means any promise or favour granted This being a favour or obligation granted, therefore, it should be deemed to be a grant and an approval of the hospitals under the section We do not think that such a supervision by the Civil Surgeon would either amount to an approval of those hospitals or the payment of travelling and daily allowances to him could be treated as a grant A grant in the above item in our opinion means any grant paid either in cash kind or even in service but it should be a real grant in the form of a donation Either there should have been some amount paid in cash as a grant or maintenance or there should have been free of charge regular and proper services of a doctor paid by the State available in any of the hospitals We cannot extend the meaning of grant any further Mere inspection by the Civil Surgeon could not be a grant There are many other officers who inspect different kinds of institutions, e g, Entertainment Commissioner visits cinemas and the travelling and daily allowances in respect of such inspections are paid by the State but it is inconceivable to say that in such cases those cinema houses are receiving any grant from the State Many other such instances can be cited

It was further argued that these institutions in any event have been treated as approved because when the Civil Surgeon goes for inspection to those hospitals, he could not go there unless they were approved hospitals and therefore those hospitals should be deemed to have been approved by the State under rule 17 We are unable to agree with this contention also The rule provides is approved by the State Government *for the purpose of the rule* It is not any approval which will be enough for an institution or a fund to come within the purview of rule 17 unless it has been specifically approved for the purpose of rule 17 It is nobody s case that there has been any such approval of those hospitals

Therefore we would answer *question no* 9 in the negative

Question no 10—This question is not very clear If an amount has been paid to an institution or to a fund which has been recognized by the State Government or a local authority as scholarships that would clearly come under item no 5 of the notification but if the scholarships are paid directly to students of an institution, the scholarships would not come under item no 5 We would like to re frame this question in the following manner

> 10 (1) Whether the scholarships paid to students through an institution recognized by the State Government or a local authority are donations within the meaning of rule 17?
>
> (2) Whether the scholarships paid to students directly would amount to donations to an institution or a fund within the scope of rule 17?

In our opinion, if an amount is donated to an educational institution recognized by the State e g, an University, a college or any other school which is either recognized by the State Government or by any of the local authorities then in that event it would amount to a donation to that institution within the meaning of rule 17 whether it is paid for the purpose of maintenance of the school for payment as scholarships to students for prize distribution for Jubilee celebrations or for any other purpose connected with the institution But if the amount is paid directly to students, who may be the students of a recognized school the donation would not come within the purview of rule 17

Therefore our answer to the re framed part (1) of *question no* 10 would be in the affirmative and of part (2) in the negative

Question no 11—We have partly answered this question in *question no* 10 If the amount has been paid to an institution recognized by the State Government or a local authority though earmarked for a scholarship, it would be a donation within the meaning of rule 17 but simply because the amount has been paid for scholarships to an institution would not make

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the institution an aided institution within the meaning of rule 17

We would therefore answer the first part of this question in the affirmative and the latter part in the negative

Question no 5—Whether condition (*b*) in the schedule of rates is applicable to Part I alone or to both Parts I and II?

This question was originally referred to this Court by the order of the Board, dated the 5th of December, 1952 and it arises in the following way

Under section 3 a schedule was appended to the Act which contained two parts The heading of the schedule was Rates of agricultural income tax Part I related to agricultural income tax and it gave the rates at which income tax would be charged on different incomes Part II related to the super tax payable by those whose agricultural income exceeded Rs 25 000 In Part I, there was a proviso to the following effect

> These rates are subject to the conditions that—
>
> (*a*) no agricultural income tax shall be payable on a total agricultural income which does not exceed Rs 3,000, and
>
> (*b*) the agricultural income tax payable shall in no case exceed half the amount by which the total agricultural income exceeds Rs 3,000

On the basis of condition (*b*) above it was argued before the Board that the agricultural income tax, including super tax, could in no event, exceed half the amount by which the total agricultural income exceeds Rs 3,000 This contention appears to have found favour with the Board and they accordingly were of the opinion that the total income tax payable by an assessee could not exceed the above amount We are unable to agree with this contention and we would answer that condition (*b*) of Schedule I applies only to Part I and not to Parts I and II

Reliance was placed on the definition of the words agricultural income tax in section 2 (2) of the Agricultural Income Tax Act which defines Agricultural Income tax as follows

> agricultural income tax means tax payable under this Act and includes super tax

And on the basis of this it was argued that when the words agricultural income tax have been used in clause (b) above they refer to the total income tax payable i e the agricultural income tax as well as the super tax Exactly similar point arose in *Raja Syed Mohammad Saadat Ali Khan* v *The State of Uttar Pradesh* (1) and a Bench of this Court has held as follows

> Section 3 therefore clearly indicates that the tax on agricultural income was categorized under two distinct heads one called agricultural income tax and the other termed agricultural super tax The intention of the Legislature was perfectly clear in keeping these two categories of tax separately for not only have these two categories been separately dealt with for the purpose of computation in so far as their rates are different but they have been spoken of as two separate types of tax The fact, that in the schedule there were two separate parts made is a clear indication to our minds of the intention of the Legislature to keep those two parts separate and that nothing of the one part was going to affect add to or detract from the provisions of the other part

Learned counsel for the assessee has argued that in this case the Bench had not considered the effect of the definition of agricultural income tax given in section 2 (2) We do not think that that definition in any way affects the question The schedule had been framed under section 3 of the Agricultural Income Tax Act Section 3 begins with these words

> 3 (1) Agricultural income tax and super-tax at the rate or rates specified in the schedule shall be charged for each year in accordance with, and subject to the provisions of this Act and rules framed under

(1) I L R [1959] 2 All 149

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clauses (a) (b) and (c) of sub section (2) of section 44 on the total agricultural income of the previous year of every person

Thus though agricultural income tax has been defined section 3 uses the term agricultural income tax in contradistinction to super tax It means that while using the words agricultural income tax in section 3, the Legislature did not intend to include super tax in it

The argument of the learned counsel is, that there should be a natural presumption that identical words used in the same section or in different parts of the same Act are intended to have the same meaning and the same effect throughout the Act But that presumption is not an irrebuttable one or a rigid one and it would readily yield where the context requires it If one arrives at a conclusion that the Legislature though it had defined a word has employed it in a different part of the Act with a different intention the court can give the real meaning to the word It would be within the competence of the court to assign one meaning to a word in one part of the Act and to assign another meaning to the same word in another part of the Act There cannot be any manner of doubt that when the Legislature was using the words agricultural income tax in section 3 it did not intend to include super tax Further, the framing of two different parts in the schedule itself shows that the intention was to keep the agricultural income tax separate from the agricultural super tax Condition (b) finds place only in Part I and is not a condition attached to both the parts

Another reason why we are finding condition (b) attached to agricultural income tax only is that the maximum agricultural income tax, which had been imposed by the schedule as it was then applicable was 4 annas in a rupee while the maximum super tax imposed was 5½ annas in a rupee, i e, according to the schedule, the total agricultural income tax and super tax payable by a person would be 9½ annas in a rupee, i e, it would be more than a half There would be a conflict between the amount of the tax imposed by the two parts if we were to hold that the agricultural income tax including

the super tax could never exceed half the amount by which the total agricultural income exceeded Rs 3,000

In our opinion, this condition had been inserted to give relief to people who might be hard hit by the strict interpretation of Part I and who had an income between Rs 3 000 and Rs 3,220 Supposing a man had an income of Rs 3,001 only Up to three thousand rupees his income was exempt but by having an income of Re 1 extra, he is liable to pay income tax on Rs 1 501 at one anna per rupee, which will amount to near about Rs 93 13 In that event it was provided that since his income above Rs 3 000 was only Re 1 he should not be liable to pay more than eight annas as income tax, because that would be half of the amount by which the total agricultural income exceeded Rs 3,000

It was contended by the learned counsel for the assessee that this schedule was amended by the Agricultural Income Tax (Amendment) Act 1954, (Act XVIII of 1954) By that amendment, Part II was done away with and in Part I only agricultural income tax was mentioned and there was no super tax It was, therefore, argued that the intention of the Legislature appeared to be to keep only one expression viz agricultural income tax and not to make any distinction between agricultural income tax and super tax It was contended that often later legislations give an indication of the mind of Legislature, as to what they meant in the earlier Act If at all to our minds the later Act appears to make it clear what the intention was because condition (*b*) was also modified in the following terms

> (*b*) in the case of assessees with income up to Rs 5 000 the agricultural income tax payable shall not exceed half the amount by which the total agricultural income exceeds Rs 4,200

By the amendment of 1954, the limit up to which the agricultural income tax was not chargeable was raised from Rs 3 000 to Rs 4,200 and the assessee, as we have pointed out above, by having only a little excess from the non taxable limit might have been hit hard therefore this provision was made for those whose agricultural

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income was up to Rs 5 000 and, therefore, to our minds what the intention of that condition was has now been made clear by this amendment

Our answer to question no 5, therefore, is that condition (*b*) in the schedule of rates is applicable to Part I alone and not to both the parts

Questions nos 12 *and* 13—Questions nos 12 and 13 now remain to be answered by us They are in respect of the application for reference which had been made beyond time They are as follows

> (12) Whether knowledge of the order passed by the Revision Board on the 26th of March, 1954, in revision application nos 149 150, 151 161, 162 and 163 of 1953 said to have been derived from a copy of the judgment obtained by the clerk of the counsel for the applicant amounted to communication to the assessee within the meaning of the word as used in section 23 of the Agricultural Income Tax Act?
>
> (13) Whether the application for reference was or was not barred by time?

We have in the earlier part of this judgment given detailed facts as to how these different references had arisen To understand this portion of the case, we may briefly repeat a few facts There had been three applications of revision under section 22, and three applications under section 24 filed on the 28th of April, 1952, by the assessee and three applications were filed by the State for reference under section 22 on the 28th May, 1952 All these nine applications were pending They were heard in the month of November 1952, and disposed of on the 5th December, 1952 and substantially the three applications of reference by the assessee were allowed and also some of the questions raised by the State were referred to this Court Some questions were finally decided and some questions were remanded for further findings to the Assessing Authority On the 5th February 1953 six applications under section 24 (2) were moved for reference by the assessee on certain points which had arisen out of the points, which had been

finally disposed of by the Board The Assessing Authority in the meantime, before those applications could be disposed of had submitted its findings on the 6th April, 1953 These applications were finally disposed of on the 26th March 1954 On the 2nd April, 1954, the Board communicated only this fact to the assessee that his six applications for reference had been allowed, but there was no mention in that communication that certain portions had been finally disposed of Against those portions in respect of which the references had been allowed the assessee was to do nothing but there were certain points of law according to the assessee which arose in that portion of the judgment, which had been finally disposed of on the 26th March 1954, and of which no communication was given to him A certified copy of the judgment was applied for on the 13th May 1954, and delivered on the same day That copy was taken by the general agent in September, 1954 When he read through the judgment he came to know for the first time that there were certain points which had been finally disposed of by the Board and of which no communication as required under the statute had been given to him, and, therefore, as soon as he came to know of it he filed an application under section 24 (2) for reference on those points also to this Court but that application for reference was dismissed on the ground of being barred by limitation Thereafter he moved an application in this Court for a reference under section 24 (4) which was numbered as Reference no 1 of 1955 That application was allowed and the Board was directed to state its case on question nos 12 and 13 The Board has sent a statement of the case by its order dated the 19th May 1954 In the opinion of the Board the answer to question no 12 is in the negative, and to question no 13 is that the application would not be barred by time

We agree with the opinion of the Board, which has now been submitted

On behalf of the State it had been argued that the word communication under section 24 (2) of the Agricultural Income Tax Act meant receipt of the judgment by which the assessee got the knowledge He relied on

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the Dictionary meaning of the word communication, which means the act of imparting conferring or delivering from one to another intercourse by words letters or messages interchange of thoughts by conference or other means It was contended that, in whatever manner the decision had been communicated or known to the assessee it would amount to a communication within section 24 Section 23 of the Act reads as follows

> 23 An authority passing any final order under section 21 or section 22 shall communicate such order to the assessee

Thus there is a mandatory provision in the Act that the authority which passes the final order under section 22 shall communicate such order to the assessee and therefore the final order on the revision application of the assessee should have been communicated by the Board to the assessee It cannot get rid of that responsibility and later on say that since the assessee had come to know of the order it was not its duty to communicate

It was argued by the learned counsel for the State that if the judgment were delivered in open court, then there would be a communication of the orders and, therefore no further communication was necessary We are unable to accept that contention What section 23 contemplates is a communication of the complete order of the Board rather a true copy of the judgment delivered by the Board or by any authority and it would be the date from the receipt of such communication that the limitation would run Under section 24 (2) the words used are within sixty days of the communication of an order under section 21 or section 22 and then the order under sections 21 and 22 has to be communicated by the authority passing such order to the assessee This order admittedly having never been communicated the period of sixty days did not start to run

Apart from this fact even though the copy of the judgment had been given to the assessee s counsel on the 13th of May 1954 it cannot be supposed that the judgment had been read on that very day The assessee and his general agent may have been under the impression that what was communicated to them on the 2nd

April 1954 was contained therein and that the copy of the judgment was obtained only for the purpose of arguments in the High Court when the matter would come up there Under the circumstances we think that the period of sixty days did not start running at all and the application filed for reference on the 30th of September 1954 cannot be deemed to be time barred

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We would therefore, answer *question no* 12 in the negative and the answer to *question no* 13 would be that the application was not time barred The Board should hear the application for reference and decide it in accordance with law

This disposes of all the questions, i e, questions nos 1 to 13 involved in the above references Some questions are answered in favour of the assessee and some against him therefore we order the costs to be easy For taxation purposes the Standing Counsel s fee is assessed at Rs 800

Questions answered

APPELLATE CIVIL

Before Mr Justice Dayal and Mr Justice Upadhya

MUNNA LAL GOEL AND ANOTHER (APPELLANTS)

v

SRI KISHAN PAHALWAN AND OTHERS (RESPONDENTS)

1959

September 8

Suit for eviction — *Permission for granted by the Rent Control and Eviction Officer—Power of District Magistrate to secure or suggest variation of the same—United Provinces (Temporary) Control of Rent and Eviction Act* 1947 *s* 3

The application for permission to sue for eviction under s 3 of the Control of Rent and Eviction Act being rejected by X the Rent Control and Eviction Officer one appellant filed an application before the District Magistrate who sent it to X with the direction Please re consider the matter after hearing the parties whereupon X gave a further hearing to the parties and granted the requisite permission

Held that an order once passed by the Rent Control and Eviction Officer cannot be cancelled or varied by the District Magistrate or by the Rent Control and Eviction Officer acting under the direction or suggestion of the District Magistrate

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The District Magistrate cannot in this context be said to be an officer superior to the Rent Control and Eviction Officer Moreover the power of a superior administrative or executive officer to control and guide his subordinates can if available to him be exercised before and not after the passing of an order

Observations to the contrary in *Mannu Lal v Chandradhar Hans* (1) *and Mahabir Prasad v The District Magistrate Kanpur* (2) disapproved

Quaere Whether the Rent Control and Eviction Officer could review the order on his own initiative and as a result of the exercise of his individual and independent judgment?

Special Appeal No 31 of 1958 from a decision of Mehrotra J dated 6th September 1957 in Civil Misc Writ No 563 of 1957

The facts appear in the judgment

F C Gupta and *K C Saxena* for the appellants

S N Kacker for the respondents

The judgment of the Court was delivered by—

DAYAL, J —This is a Special appeal by Munna Lal Goel and Srimati Ram Katori Goel against the order of Mr Justice MEHROTRA, allowing the writ petition under Article 226 of the Constitution filed by Sri Sri Krishna and Sri Puran Chand Mehrotra respondents 1 and 2 respectively

The appellants are the owners of certain premises occupied by the aforesaid respondents They applied to the Rent Control and Eviction Officer for permission to sue these respondents for ejectment under section 3 of the U P (Temporary) Control of Rent and Eviction Act—hereinafter called the Act— on the allegation that they wanted those premises for Munna Lal Goel's occupation in order that he might carry on his business there The respondents contended that Munna Lal Goel did not require the shop for the purpose alleged The Rent Control and Eviction Officer after making enquiries rejected that application on the 31st January, 1956

The appellants did not then file a revision before the Commissioner under sub section (2) of section 3 of the Act, which they could do within thirty days from the

(1) 1952 A L J 278 (2) 1955 A L J 252

communication of the order of the Rent Control and Eviction Officer to them Instead, Srimati Ram Katon, appellant no 2 presented an application dated the 13th February 1956 to the District Magistrate Kanpur stating therein the circumstances of the family, denying that any request for enhancement of rent was made to the respondents and just stating that Munna Lal Goel, her son had applied to the Rent Control Officer, but that application was decided in favour of the respondents on account of their wrong statement and ignorance of Munna Lal Goel She prayed that her shop be got vacated and that thus justice be done and promised that she would not let it out on rent and that her son would carry on business in the shop The District Magistrate sent this application to the Rent Control and Eviction Officer with the direction Please re consider the matter after hearing the parties

The Rent Control and Eviction Officer accordingly gave a further hearing to the parties and on the 1st October, 1956 granted the appellants permission to sue the respondent for ejectment

The respondents then went to the Commissioner in revision The Additional Commissioner dismissed the revision They then filed the writ petition which was allowed by the learned Judge by an order which is the subject matter of this appeal

The learned Judge held that the District Magistrate s direction forwarding the application of the appellant no 2 to the Rent Control and Eviction Officer amounted to his cancelling the order dated the 31st January 1956 of the Rent Control and Eviction Officer refusing permission to sue for the ejectment of respondents and that this the District Magistrate could not do He further held that the Rent Control and Eviction Officer in his subsequent order granting the permission had not considered the point of view of the tenants at all He also held that in these circumstances it could not be said that the Rent Control and Eviction Officer had independently applied his mind to all the relevant considerations under section 3 of the Act He made it clear in his order

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Dayal J.

that it was open to the landlords to make a fresh application for permission to file a suit which would be dealt with by the Rent Control and Eviction Officer in accordance with law. The appellants do not appear to have taken advantage of this alternative open to them and filed the Special appeal presumably knowing full well that it would take considerable time for disposal.

The main contention for the appellants is that the direction of the District Magistrate has been misconstrued by the learned Judge and that it did not amount to the District Magistrate's cancelling the order of the Rent Control and Eviction Officer dated the 31st January, 1956. Further it is contended that the District Magistrate could legally give such a direction as he had given in this case to the Rent Control and Eviction Officer. We do not agree with these contentions.

It is necessary to determine the nature of the District Magistrate's direction on the application presented by Srimati Ram Katori on the 13th February, 1956. The direction was to re-consider the matter after hearing the parties. It is true that the District Magistrate did not specifically say that he was cancelling the order of the Rent Control and Eviction Officer and that he did not order the Rent Control and Eviction Officer to cancel his previous order. The District Magistrate simply asked that officer to re-consider the matter after hearing the parties. The Rent Control and Eviction Officer had finished with the matter. He had decided it finally holding that the appellants had no genuine need for the premises. The aggrieved party could go to the Commissioner against the order within thirty days of the order. We doubt whether the Rent Control and Eviction Officer in the absence of any provision could have reviewed the order even if he had been approached direct. No question of re-consideration, therefore, could possibly arise. Reconsideration can take place only when the previous order be cancelled or be deemed to have been cancelled. We are, therefore, of opinion that the District Magistrate's direction did amount to the implied cancellation of the order of the Rent Control and Eviction

Officer refusing to give permission for suing the respondents for ejectment The District Magistrate's order in the alternative would amount to a direction to the Rent Control and Eviction Officer to cancel his previous order to re-hear the parties and then to decide the matter afresh Whichever of the two interpretations be given to the District Magistrate's order, the District Magistrate had no jurisdiction to pass such an order There is ample authority to support this view

The earliest case is that of *R N Seth* v *Girja Shanker* (1) There the Rent Control and Eviction Officer of Lucknow granted permission on the 28th April 1947, to institute the suit for ejectment That permission was revoked by the District Magistrate Lucknow on the 24th July, 1947 It was observed in this case at page 822

> The power exercised by the District Magistrate in cancelling the order previously passed by the Rent Control and Eviction Officer was in the nature of an appellate or revisional power which cannot be exercised in the absence of an express statutory enactment No power is given under the Control of Rent and Eviction Act to any authority to sit in appeal or revision against an order passed by the District Magistrate under section 3 of the Act and the District Magistrate could not, therefore revise the order of the Rent Control and Eviction Officer passed on 28th April 1947

It may just be mentioned that in 1947 there was no provision for filing a revision before the Commissioner against the order of the District Magistrate or the Rent Control and Eviction Officer under sub section (1) of section 3 Such a provision was made in 1952 by the U P (Temporary) Control of Rent and Eviction (Amendment) Act (XXIV of 1952) which came into force on the 1st October, 1952

In *Jang Bahadur* v *District Magistrate, Banaras* (1) the Additional District Magistrate set aside the order of allotment made by the Assistant Rent Control Officer

(1) A I R 1952 All 819 (2) 1954 A L J 225

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On merits the order of the Additional District Magistrate was considered to be correct and, therefore the petition was rejected V BHARGAVA, J considered this case distinguished it and left the question open remarking at page 227

> It is obvious that if two officers exercise the same power one cannot revise the order of another But if the jurisdiction is concurrent, it may be possible for one to review the order of another

Similar view is implied in the observations of MALIK, C J, in *Syed Abdul Hamid* v *Smt Fatima Begam* (2) He said at page 138

> If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now revisable by the Commissioner and then by the Local Government the District Magistrate who has neither appellate nor revisional powers may not be entitled to interfere, but where, as in this case the District Magistrate has all along been functioning through the Rent Control and Eviction Officer and bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on the 6th of April, 1949 was without jurisdiction as by that order he was merely recalling a permission which had been granted at his instance

In *Mahabir Prasad* v *The District Magistrate, Kanpur* (2) the Rent Control and Eviction Officer passed an allotment order in favour of Mahabir Prasad on the 14th June 1951 The unauthorized occupant Bansidhar failed in his various attempts to get that order set aside and after an order for his eviction under section 7 A of the Act had been issued, he approached the District Magistrate on the 12th May, 1953 and prayed that a fresh enquiry might be held and further proceedings for his eviction might be stayed The District Magistrate by his order dated the 18th September 1953, directed the Rent Control and Eviction Officer to cancel the allotment made by him in Mahabir Prasad s favour and to

(1) 1955 A L J 132 (2) 1955 A L J 252

allot the shop to Bansidhar The Rent Control and Eviction Officer passed an order on the 26th September, 1953 allotting the shop of Bansidhar as demanded by the District Magistrate BRIJ MOHAN LALL, J, said at page 255

> The mere fact that another officer has also been empowered under the Act does not take away the District Magistrate s own power Both of them can exercise concurrent jurisdiction If a petitioner instead of applying to the Rent Control and Eviction Officer approaches the District Magistrate, the latter has certainly jurisdiction to pass a suitable order thereon But a power under concurrent jurisdiction can be exercised so long as it has not been exercised in respect of the same matter by another co ordinate authority To hold that the District Magistrate can interfere with an order of the Rent Control and Eviction Officer even after that officer has passed an order will mean converting an authority of concurrent jurisdiction into a superior authority Moreover, anomalous results will follow from such a proposition If the District Magistrate exercising a concurrent jurisdiction is held entitled to upset the order of the Rent Control and Eviction Officer the latter can for similar reason again upset the order of the District Magistrate This will lead to utter confusion This could never have been the intention of law

He further held that the District Magistrate as a superior authority could not upset the order of the Rent Control and Eviction Officer and observed at page 256

> Where a power is exercised by a public servant under statutory sanction, that power can be exercised by him alone and not by any superior authority But the higher authority cannot by its own order set aside the order of the inferior authority and assume to itself an appellate or revisional and power, which has not been conferred upon it by the statute If it were possible to hold that the District Magistrate by reason of being a superior authority can

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upset the Rent Control and Eviction Officer's order, it will follow from the same process of reasoning that the Commissioner can also by reason of being a higher authority upset the District Magistrate's order and the State Government can upset the Commissioner's order

BRIJ MOHAN LAL, J, further held that the Rent Control and Eviction Officer could not lawfully cancel his own order when that cancellation was not the result of the exercise of his own discretion but was brought about in pursuance of an order of a superior authority and that, as such it was really the order of the superior authority and that authority could not be permitted to do through the agency of its subordinates, what it could not do itself

MOOTHAM, C J, agreed that the District Magistrate could not cancel the allotment order made by the Rent Control and Eviction Officer

In *Sri Ram Chandra* v *The District Magistrate, Kanpur* (1) the Rent Control and Eviction Officer fixed the rent of the accommodation in suit at Rs 40 per month The landlady instead of filing a suit in the civil court under sub section (3) of section 3 A of the Act approached the District Magistrate who called for a report from the Rent Control and Eviction Officer and later directed the Rent Control and Eviction Officer to re open the proceedings and to submit another report to him

BRIJ MOHAN LAL, J held that the District Magistrate had no power to issue such an order to the Rent Control and Eviction Officer and observed

> The District Magistrate had no power to issue any order to him If the District Magistrate had contented himself with suggesting to the Rent Control and Eviction Officer to re hear the petitioner and had left the said officer free to accept that suggestion or not, the position would have been different What the District Magistrate has done is to call for a report and after the receipt of that

(1) Civil Miscellaneous writ no 830 of 1953 decided on 16th March 1955

report to direct further enquiry He has also said that after that enquiry he will pass the order himself He had no jurisdiction whatsoever to do so

The case fully supports the contention for the respondents that the District Magistrate could not order the Rent Control and Eviction Officer to re-consider his previous order It may be mentioned, however that BRIJ MOHAN LALL, J, had said in *Mahabir Prasad v The District Magistrate, Kanpur* (1) decided a fortnight earlier, that the superior authority may even ask the Rent Control and Eviction Officer to re consider his decision, leaving to him the freedom to change its mind or not

Similar view was expressed by MEHROTRA, J in *Sri K G Nene v The Rent Control and Eviction Officer Kanpur* (2), where the facts were practically similar to those of *Mahabir Prasad's case* (1) MEHROTRA, J, observed at page 782

> No power of revision or appeal against the order of the Rent Control and Eviction Officer has been given to the District Magistrate under the Act and if the District Magistrate cancels any order passed by a subordinate officer or issues specific directions to him it would be in effect exercising powers of an appellate and revisional court

In *Sri Bishambhar Nath Saxena v District Magistrate, Jalaun* (3) a similar view was expressed In that case the District Magistrate cancelled the order of allotment passed by the Rent Control and Eviction Officer and directed him to make a re allotment of the premises after due publicity It was held that the District Magistrate had no power to set aside or cancel the order of the Rent Control and Eviction Officer AGARWAL, J, said at page 274

> In other words, when once an order has been made by the Rent Control and Eviction Officer, it is beyond the jurisdiction of the District Magistrate to set aside or to revise it unless the Act empowers him to do so

(1) 1955 A L J 252 (2) 1955 A L J 778
(3) 1956 A L J 272

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In *Mohammad Yunus v The District Magistrate, Kanpur* (1), the Rent Control and Eviction Officer passed an order on the 15th January 1955 granting permission to the landlords to file the suit for ejectment The tenant then presented two applications, one before the Rent Control and Eviction Officer for a re consideration of his order and another before the District Magistrate with the same prayer The Rent Control and Eviction Officer rejected the application presented to him on the 2nd February 1955 The District Magistrate, however, directed the Rent Control and Eviction Officer by his order, dated the 21st February 1955, to hear the parties and to report to him and to ask the landlords not to file the suit for ejectment in the civil court The Rent Control and Eviction Officer complied with these directions and his final report to the District Magistrate suggested that the permission already granted be cancelled The District Magistrate then ordered on the 15th June 1955 Please cancel permission to evict given to the landlord On receipt of this order the Rent Control and Eviction Officer cancelled his previous order It was held that the re hearing started at the instance of the District Magistrate, that the Rent Control and Eviction Officer throughout acted under the directions of the District Magistrate and that the cancel lation of the permission was under the directions of the District Magistrate and not due to any independent volition of the Rent Control and Eviction Officer him self The cancellation order was, therefore, held to be bad and was quashed

It is therefore, well settled that the District Magistrate cannot cancel or direct the Rent Control and Eviction Officer to cancel his previous order passed in the exercise of the statutory powers conferred on him under the Act

Even if it be assumed that the District Magistrate s order did neither amount to cancelling the order of the Rent Control and Eviction Officer impliedly, nor to directing the Rent Control and Eviction Officer to cancel his previous order and that it was simply an order by a

(1) Civil Miscellaneous Writ No 33 of 1956 decided on 4th December, 1956

superior officer to a subordinate officer suggesting to him a re consideration of the matter after hearing the parties, we are of opinion that such a suggestion cannot be made by the District Magistrate to the Rent Control and Eviction Officer It is open to question whether the District Magistrate is really a superior officer of the Rent Control and Eviction Officer when the latter exercises certain powers of the District Magistrate under the Act The Act does not contemplate any officer subordinate to, or inferior to, the District Magistrate It does not, of course contemplate by the expression District Magistrate just the District Magistrate who is the head of the district administration By the expression District Magistrate the Act means not only the District Magistrate who is the head of the district administration but also an officer who is authorized by the District Magistrate to perform any of his functions under the Act, such an officer is usually called the Rent Control and Eviction Officer The moment the District Magistrate has authorized some other person to perform such functions, that officer for the purpose of the Act is as good a District Magistrate as the District Magistrate conferring the power is The Act makes no distinction between their respective powers and has not given any particular power to the District Magistrate which he could exercise with reference to the orders passed by the Rent Control and Eviction Officer or with reference to the proceedings pending before him The District Magistrate should not, in the interest of proper discharge of his duties by the Rent Control and Eviction Officer, make any particular suggestion to the latter in connection with a matter pending before him The Rent Control and Eviction Officer has to exercise his own mind with respect to the matter for determination before him The mere fact that the District Magistrate authorizes such an officer to perform certain of his functions under the Act does not by itself make him in the absence of any such provision in the Act, a superior to the Rent Control and Eviction Officer So the very first premise for the contention that the District Magistrate can make a suggestion for re consideration to the Rent Control and Eviction Officer falls to the ground and there remains no question

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of such suggestions being considered to be valid due to the general power of a superior to guide a subordinate in the exercise of his executive or administrative powers

The first reference to such a power in the District Magistrate as a superior officer is found in *Mannu Lal v. Chakradhar Hans* (1) In that case the Rent Control and Eviction Officer gave permission for suing the tenant for ejectment on the 28th December, 1948, but later on i e, on the 12th February 1949, withdrew it The land lord, however, ignored the revocation of the permission and instituted a suit contending that the Rent Control and Eviction Officer could not revoke his previous order and that in fact the revocation order was passed by him under the dictation of the District Magistrate The courts agreed and decreed the suit for ejectment On second appeal the suit was dismissed in view of the find ing that the Rent Control and Eviction Officer had in herent jurisdiction to revoke the sanction A Special appeal was then filed It was held that the Rent Control and Eviction Officer exercised administrative or executive power and not a judicial or quasi judicial power in consi dering an application for permission to sue under sec tion 5 of the Act, that the Rent Control and Eviction Officer on further consideration could revise his previous order if he considered it proper and that no opportunity need be given to the landlord to show cause before the previous order passed by the Rent Control and Eviction Officer could be cancelled It is in connection with the objection about the Rent Control and Eviction Officer passing the subsequent order under the dictation of the District Magistrate, which was disallowed, that MALIK, C J, said

> An administrative or executive power has to be exercised always subject to the control of the supe rior officers and we see no objection to the second order having been passed at the directions of the District Magistrate

It does not appear from this judgment, what was the actual order of the District Magistrate The file of the

(1) 1952 A L J 278

Special appeal, however, shows that the District Magistrate s order contained the direction Previous order passed on this subject will be revised in the light of this order Consequently the Rent Control and Eviction Officer withdrew the permission previously granted

AGARWALA, J, who was a member of the Bench delivering this judgment, himself held differently in *Sri Bishambhar Nath Saxena* v *District Magistrate, Jalaun* (1) He held that the District Magistrate could control and guide the Rent Control and Eviction Officer before he passed any order but could not do so after the Rent Control and Eviction Officer had exercised his power and made an order, and explained the import of the abovementioned observation of MALIK, C J He said at page 274

> 'In the exercise of administrative functions there is scope for the officer exercising them being controlled by superior officer unless the exercise of the discretion is vested in the particular officer by a statutory provision As already stated, the Act authorizes the District Magistrate to perform the functions mentioned therein It also authorizes an officer authorized by him to act on his behalf to do the same so far as his authority will extend It follows therefore that in administrative matters the agent of the District Magistrate may be guided by the latter as to the manner in which he will exercise the functions entrusted to him, see *Mannu Lal* v *Chakradhar Hans* (2) Before the Rent Control Eviction Officer has exercised any of the powers vested in the District Magistrate under the Act, he may be controlled and guided by the District Magistrate his principal Once he has so exercised his powers his order is an order under the Act, and it can be interfered with only as provided under the Act and not otherwise

In *Sri Syed Abdul Hamid* v *Smt Fatima Begum* (3), even MALIK, C J, was not prepared to go to the length

(1) 1956 A L J 272 (2) 1952 A L J 278

(3) 1955 A L J 132

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these observations ostensibly go due to amendment in law In that case, the landlord applied to the District Magistrate for permission to sue the tenant for ejectment The District Magistrate forwarded the application to the Rent Control and Eviction Officer saying that the landlord be permitted to file a suit after two months The Rent Control and Eviction Officer accordingly gave the necessary permission without even issuing notice to the tenant When the tenant filed an objection before the District Magistrate, the latter cancelled the permission granted to the landlord by the Rent Control and Eviction Officer and directed that notice be issued to the tenant and that both the parties be heard in the case before final orders were to be passed The Rent Control and Eviction Officer thereafter heard the parties and recommended to the District Magistrate that the original permission be maintained The District Magistrate, however was of a different opinion and wrote back that it would be unfair to turn out a tenant of long standing without giving him alternative accommodation the house suggested being too small for his family The Rent Control and Eviction Officer thereafter refused the permission MALIK, C J, reiterated what he had said in *Mannu Lal's* case (1) about the exercise of administrative or executive power subject to the control and guidance of the superior officer but said, what is already quoted before, at page 158

> If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now revisable by the Commissioner and then by the Local Government, the District Magistrate, who has neither appellate nor revisional powers may not be entitled to interfere, but where, as in this case the District Magistrate has all along been functioning through the Rent Control and Eviction Officer and bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on the 6th of April 1949 was without jurisdiction as by that order he was merely recalling a permission which had been granted at his instance '

(1) 1952 A L J 278,

In *Mahabir Prasad* v *The District Magistrate, Kanpur* (1) BRIJ MOHAN LAL, J said at page 256

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> Where a power is exercised by a public servant under statutory sanction that power can be exercised by him alone and not by any superior authority The superior authority may give him suggestion and may even ask him to re consider his decision leaving to him the freedom to change its mind or not If in such circumstances the officer who originally passed the order changes his mind and arrives at a contrary conclusion, the order will be perfectly valid because it would be the order of the original authority and not of the higher authority

He explained the observations in *Mannu Lal's* case (2) thus at page 257

> What the learned CHIEF JUSTICE meant by the above quoted remark was that the District Magistrate could suggest new facts and new aspects of the case to the Rent Control and Eviction Officer and could ask him to re consider the matter in the light of those suggestions Had it been his Lordship's intention to say that the District Magistrate could substitute his own discretion for the discretion of the Rent Control and Eviction Officer, a more explicit language would have been used It may again be pointed out that in the Full Bench case cited above the Hon ble the CHIEF JUSTICE has remarked that where the Rent Control and Eviction Officer has been acting independently, different considerations arise and it is not possible for the District Magistrate to interfere His remark relied upon by the learned counsel for the opposite party are to be interpreted in the light of his observations in the Full Bench case Obviously his Lordship meant that the District Magistrate could ask the Rent Control and Eviction Officer to re-consider the matter He did not mean to hold that the District Magistrate could overrule the decision of the Rent Control and Eviction Officer

(1) 1955 A L J 252 (2) 1952 A L J 278

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With respect, we do not agree with this interpretation of the remarks as in that case it had been found that the Rent Control and Eviction Officer passed the cancellation order *at the dictation* of the District Magistrate.

It is clear from the above discussion that the view expressed in *Mannu Lal's* case (1) about the exercise of administrative or executive power by the Rent Control and Eviction Officer under the control and guidance of the District Magistrate the superior officer has not been fully accepted in later cases which clearly lay down that an order once passed by the Rent Control and Eviction Officer cannot be cancelled varied or amended by the District Magistrate or by the Rent Control and Eviction Officer under his directions even if the Rent Control and Eviction Officer himself can do so on his own initiative and as the result of his exercising his own mind independently and that such guidance can be given prior to the Rent Control and Eviction Officer's passing an order and not later.

Just as it has been considered in the Full Bench case of *Sri Syed Abdul Hamid* v. *Smt. Fatima Begum* (2), that the subordinate Magistrate will not think of interfering with the order of his superior the District Magistrate it can be said that the Rent Control and Eviction Officer will not think of not acting according to the recommendation or suggestion of the District Magistrate and that therefore, any suggestion or recommendation by the District Magistrate in connection with an order already passed by the Rent Control and Eviction Officer must have the result of depriving that officer of the exercise of his own independent mind. When the District Magistrate asked the Rent Control and Eviction Officer in the present case to reconsider the matter after hearing the parties the Rent Control and Eviction Officer had no option but to reconsider the matter which, as already mentioned implied setting aside his original order and replacing it by a subsequent order which may be of the same nature but certainly would be a new order. It may be said that the District Magistrate by his recommendation had allowed the application for review

though he had left the actual review of the previous order to the Rent Control and Eviction Officer. Both the acts i.e. the act of considering the question whether a review application should be granted or not and if granted the act of finally deciding the matter are to be performed by the same officer just as they are done in court. Here the District Magistrate undoubtedly did the first act, i.e. allowed the review application to the extent that the case be re-heard. He did not pass the final order nor did he give any direction about it. It was left to the Rent Control and Eviction Officer to pass a suitable order after hearing the parties. The District Magistrate's order, therefore undoubtedly trespassed over the jurisdiction of the Rent Control and Eviction Officer and thus adversely affected his jurisdiction. It cannot be said what the reaction of the Rent Control and Eviction Officer himself would have been to the application of Smt. Ram Katori if it had been presented to him and had not been received by him with the District Magistrate's recommendation.

It has been urged for the respondents that the order of the Rent Control and Eviction Officer becomes final after thirty days if no revision is filed and that therefore, even the Rent Control and Eviction Officer cannot revoke his previous order. It is not necessary to consider this question as we have held that the Rent Control and Eviction Officer did not review the order at his own instance and had done so under the direction of the District Magistrate.

It may be open to the Rent Control and Eviction Officer to entertain a fresh application for permission to sue after he has rejected a previous one but such a successive application will be entertained ordinarily only on the basis of fresh material which was not available at the consideration of the previous application. The application of Sriman Ram Katori to the District Magistrate in the present case was not a fresh application for permission. It was an application alleging that the order on the earlier application had been wrong and praying for justice being done by having the other party vacate the

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premises. Paragraph 12 of the counter affidavit, sworn to by Munna Lal Goel, states:

> The only object of approaching the District Magistrate was that the deponent's application under section 3 may be properly considered on merits and disposed of according to law.

In the circumstances it is not open to the appellants to urge that this was a fresh application for permission. It was clearly an application to the District Magistrate for setting aside the order of the Rent Control and Eviction Officer.

It has been strenuously urged for the appellants that there being no error apparent on the face of the record this Court could not interfere when the Rent Control and Eviction Officer and the Commissioner have followed the procedure laid down in the Act. We have already indicated that what took place in the present case was not in conformity with what is provided in the Act. The Act does not provide for the District Magistrate's interference with the order of the Rent Control and Eviction Officer either by directly interfering with it or by directing its variation by the Rent Control and Eviction Officer himself. The error committed by the Rent Control and Eviction Officer in reviewing his previous order in the circumstances of this case is fairly well apparent. The Commissioner took a wrong view of the law as interpreted by this Court and his order also, therefore, suffers from an apparent error of law. This Court can interfere with such an order.

It has also been contended for the appellants that the respondents did not avail of the right to go to the State Government in view of its powers under section 7 F of the Act. It was held in *Brij Kishore* v. *The Rent Control Officer, Kanpur* (1) that this section gives no right to a party to approach the Government. It was observed at page 176:

> We are of opinion that this section does not afford any alternative remedy to the applicants. The applicants have not been given any right to

(1) 1954 A. L. J. 172

approach the State Government to revise the order passed by the Rent Control and Eviction Officer This section just empowers the State Government to call for the record and make suitable orders The applicants therefore cannot approach the State Government by way of appeal or revision against the order of the Rent Control and Eviction Officer'

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Dayal J

We are therefore of opinion that the District Magistrate had no power to pass the order he did directing matter after hearing the parties and thet that order and the Rent Control and Eviction Officer to re-consider the Officer were bad in law and had been rightly set aside the subsequent order of the Rent Control and Eviction by the learned Judge

In view of the above, we dismiss this appeal with costs

Appeal dismissed.

CRIMINAL MISCELLANEOUS

Before Mr Justice V D Bhargava

1957

December, 2

D G ATHALYE

v

STATE

Criminal Procedure Code, 1898, *ss* 526, 561*A—Industrial Disputes (Appellate Tribunal) Act*, 1950, *s* 22*—United Provinces Industrial Disputes Act*, 1947, *ss* 14 22*—Government notification no* 4464*(LL)/XXXVI B—*257*(LL)*-1954, *dated* 14*th July*, 1954, *cls* 29 38*—United Provinces General Clauses Act*, 1897 *s* 4(2), (17)*—Labour Disputes pending before different authorities—Permission to dismiss an employee obtained in good faith from the Labour Appellate Tribunal only—Prosecution for omission to secure permission from the Regional Conciliation Officer—Defence under s* 22 *Industrial Disputes Act, if available—Good faith "Act done" includes illegal omission*

While labour disputes between the Upper Ganges Valley Electricity Supply Co Ltd. Moradabad and its employees were pending *inter alia* before the Regional Conciliation Officer, Kanpur, and the Labour Appellate Tribunal, D G A., Resident

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D G ATHALYE v STATE

Engineer of the Company dismissed G S S Mains Foreman on the strength of permission secured *bona fide* on 6th March 1956 from the Labour Appellate Tribunal alone under s 22 Industrial Disputes (Appellate Tribunal) Act 1950 Thereupon District Magistrate Moradabad instituted complaint against D G A under s 14 U P Industrial Disputes Act 1947 read with c. 29 Government notification no 4-464 (LL)/XXXVI B–257 (LL)-1954 dated 14th July 1954 for the above dismissal without permission from the Regional Conciliation Officer of the area concerned

Upon application by the accused under ss 526, 561-A, Criminal Procedure Code

Held, (i) that there was no allegation of bad faith and there could be no presumption of bad faith against the accused,

(ii) that he had acted in good faith as defined in s 4(17) U P General Clauses Act

(iii) that his illegal omission amounted to act done under s 4(E), U P General Clauses Act

(iv) that he was protected by s 22 U P Industrial Disputes Act.

The criminal proceedings were, therefore, quashed

Criminal Miscellaneous No 1755 of 1957

The facts appear in the judgment

Gopal Behari for the applicant

G A for the State

V D BHARGAVA, J —This is an application under sections 561 A and 526 of the Criminal Procedure Code for quashing the proceedings, or in the alternative to transfer the case from Moradabad to some other adjoining district The applicant Sri D G Athalye was Resident Engineer of the Upper Ganges Valley Electricity Supply Co, Ltd, Moradabad, on the 12th of March 1956, but on the date of the prosecution he had ceased to be so There were labour disputes pending between the company, of which the applicant was the Resident Engineer, and its employees, one of them being one Sri G S Srivastava, Mains Foreman These labour disputes had been pending both before the Regional Conciliation Officer, Kanpur, and the Central Government Industrial Tribunal, India, Lucknow, and also before the Labour

Appellate Tribunal in appeal The company wanted to dismiss Sri G S Srivastava on account of misconduct and, therefore, permission was sought from the Central Government Industrial Tribunal Lucknow, to dismiss him as required under section 22 of the Industrial Disputes (Appellate Tribunal) Act 1950 Section 22 of it runs as follows

> During the period of thirty days allowed for the filing of an appeal under section 10 or during the pendency of any appeal under this Act, no employer shall—
>
> (a)
>
> (b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such appeal, save with the express permission in writing of the Appellate Tribunal

On the 8th of March 1956, the Industrial Tribunal gave permission to the company to dismiss Sri G S Srivastava and thereupon Sri G S Srivastava was dismissed

The District Magistrate of Moradabad thereafter instituted a complaint under section 14 of the U P Industrial Disputes Act, read with clause 29 of the Government notification no 4—464 (LL)/XXXVI—B—257 (LL) 1954 dated 14th July 1954 on the ground that the workman was dismissed without the permission of the Regional Conciliation Officer of the area concerned. Clause 29 of the said notification reads as follows

> During the pendency of any conciliation proceedings or proceedings before the Tribunal or an Adjudicator in respect of any dispute an employer shall not—
>
> (a)
>
> (b) discharge or punish, whether such punishment is by dismissal or otherwise, any workman concerned in such dispute
>
> Save with the express permission in writing of a Conciliation Officer of the area concerned, irrespective of the fact whether the dispute is pending before a Board or the Tribunal or an Adjudicator"

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V D Bhargava, J

Clause 33 of the same order provides

> Any person who contravenes or attempts to contravene any provisions of this Order or abets any such contravention shall be liable, on conviction to fine or to imprisonment not exceeding three years or both

It has been asserted that since the matter had been pending both before the Appellate Tribunal as well as the Regional Conciliation Officer, the applicant thought that the permission of the appellate authority to dismiss would be enough and no separate permission from the Conciliation Officer was necessary It has further been stated that in similar cases when permission of the Regional Conciliation Officer of the area concerned had been sought for, such officers had declined to give permission on the ground that the permission of the Appellate Tribunal alone would be deemed sufficient and that no permission of the Conciliation Officer was necessary In order to support his case the applicant has filed as Annexure E an order of the Additional Regional Conciliation Officer, Bareilly, dated the 7th of October, 1953 where the Regional Conciliation Officer did not pass any order on the ground that proceedings relating to that concern were pending in appeal before the Hon ble Appellate Tribunal in which workmen were involved He had ordered that the employers, if they so desired, should take permission under section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 Similar is the order by the same officer in another case which has been filed as Annexure F Another Regional Conciliation Officer of another region in the case of a sister company, i e, U P Electric Supply Co, Ltd, Allahabad, had passed similar order In that case permission was sought to discharge one of the employees The Additional Regional Conciliation Officer of Allahabad on 1st September, 1955, ordered that as he had been informed that appeals are pending before the Labour Appellate Tribunal of India, the company should seek permission from there and no permission was granted by the Regional Conciliation Officer Annexure H is also an order to the same effect.

When the Conciliation Officer was requested to give the permission again after these orders, he informed that the decision had already been intimated and no further action could be taken by that office

The present prosecution is under clause 33, read with section 14 of the U P Industrial Disputes Act, 1947 There can be no doubt that so far as the present applicant is concerned he had acted *bona fide* His company as well as the sister concern had on previous occasion tried to obtain permission to dismiss employees from the Regional Conciliation Officer of the area concerned but they had refused to give permission on the ground that because cases are pending before the appellate authorities permission should be given by them and they did not exercise their right and there had been several occasions when this reply had been received by the company Thereafter, the applicant acted on that advice and dismissed Sri G S Srivastava after taking permission from the Appellate Tribunal It cannot but be said that the applicant had acted in good faith Good faith has been defined under section 4 (17) of the General Clauses Act as meaning anything done honestly whether it is done negligently or not

Here I am of opinion that there can be no doubt of the good faith of the applicant He was under a *bona fide* impression that since permission from the Appellate Tribunal—which was higher authority—had been obtained no permission of the Regional Conciliation Officer was required He had also very good reasons to arrive at that conclusion because in several of the cases Regional Conciliation Officers had also rejected the applications for permission on that very ground

I do not wish to express any opinion on the question whether in such circumstances permission of the Regional Conciliation Officer of the area concerned was necessary or not Even assuming that it was necessary, in any event, the applicant is protected by section 22 of the U P Industrial Disputes Act, which reads as follows

> No suit prosecution or other legal proceedings shall lie against any person for anything which is

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in good faith done or intended to be done in pursuance of this Act or any rule or order made or deemed to be made thereunder

Thus, if the applicant in good faith dismissed Sri G S Srivastava, I think he would be protected under this section It may be argued that this section only says an act done in good faith but here there was an omission of obtaining the permission for which he is being charged and therefore, it can be said that section 22 would not apply to the facts of the present case Section 4 (2) of the U P General Clauses Act provides Act used with reference to an offence or a civil wrong shall extend series of acts and words which referred to acts done include also to illegal omissions

Thus if that omission, though may be illegal, was *bona fide* it would amount to act done within the meaning of section 22 of the Industrial Disputes Act

I have perused the complaint filed in this case against the applicant which is Annexure B and the affidavit There is no allegation of bad faith on the part of the applicant Under the circumstances unless there be circumstances from which inference of bad faith can be drawn it would be deemed that he was acting in good faith and there cannot be a presumption of bad faith against an accused I, therefore, allow this application and quash the proceedings

Application allowed

1958

July 21

APPELLATE CIVIL

Before Mr Justice Bhargava and Mr Justice Takru

ASLAM KHAN (APPELLANT)

v

FAZAL HAQUE KHAN AND OTHERS (RESPONDENTS)

Citizenship of India—*Acquisition under the Constitution—Acquisition by Registration under the Citizenship Act—Requisites of—Constitution of India*, 1950 *Arts* 5 *and* 7—*Citizenship Act* 1955 *ss* 2(1)(*b*) 2(1)() 5(1)(*a*) 5(1)(*e*) *and* 5(3)

AK, who had his domicile of origin in India where he and both of his parents had been born and living ever since,

opted finally for Government service in and migrated to Pakistan after the first day of March 1947 He served Pakistan Government for six months and then resigned and came back to India in February 1948 On the 31st August 1956 he obtained a certificate of registration as an Indian citizen from the Collector of Rampur and was elected to the U P Legislative Assembly in 1957 His election being challenged *inter alia* on the ground that he was not a citizen of India

Held (i) that notwithstanding the fact that he fulfilled all the essentials for Indian citizenship under Art 5 of the Constitution his case fell within Art. 7 so that he never acquired Indian citizenship under the Constitution

(ii) that for the purposes of acquisition of Indian citizenship by registration under the Citizenship Act, his case was covered

(x) not by s 5(3) since he could not be said to have ever renounced or been deprived of Indian citizenship

(y) nor by s 5(1)(c) since he could not in the absence of the requisite notification by the Central Government under s 2(1)(c) be deemed to be a citizen of Pakistan

(z) but by s 5(1)(a) as a person of Indian origin ordinarily resident of India and being so resident for six months immediately before making the application for registration

(iii) that it was under the circumstances not necessary for him to obtain registration from the Central Government and that the registration by the Collector being good and sufficient he became the citizen of India on the 31st of August 1956 and was therefore duly qualified for the membership of the Legislature

First Appeal No 110 of 1958 from an order of R Chandra, Member, Election Tribunal, Rampur, dated 19th February 1958, in Election Petition No 53 of 1957

The facts appear in the judgment

S N Dwivedi and *K K Bajpai* for the appellant

Jagdish Swarup and *D P Agarwal* for the respondents.

The judgment of the Court was delivered by—

BHARGAVA, J —The appellant Aslam Khan respondents Fazal Haque Khan Abdul Hadi Khan and Sita Ram and one Tribeni Sahai Misra were candidates for election to the U P Legislative Assembly in the general elections held in February and March, 1957 from no 65, Rampur Constituency All the five candidates filed nomination papers on the 31st of January, 1957, and after

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scrutiny, they were declared duly nominated on the 1st of February, 1957 Tribeni Sahai Misra, who is not a party to this appeal withdrew his candidature within the time permitted by law The polling in the constituency took place on the 22nd of February, 1957 and the counting on the 1st of March, 1957 The same day the result was announced and Aslam Khan appellant was declared duly elected Thereupon Fazal Haque Khan, respondent no 1 filed an election petition before the Election Commission challenging the election of Aslam Khan appellant The election petition was sent for trial to the Election Tribunal, Rampur The main ground, on which the election was challenged, was that Aslam Khan appellant was not a citizen of India and, consequently, under Article 173 of the Constitution he was not qualified to be chosen to fill a seat in the Legislature of Uttar Pradesh and, further for the same reason he was disqualified for being chosen as, and for being, a member of U P Legislative Assembly under Article 191 (1) (d) of the Constitution The election was also challenged on various other grounds, including commission of corrupt practices, falling under various sub sections of section 123 of the Representation of the People Act, 1951, as amended up to date The Election Tribunal held on all points in favour of the appellant except on the question of the appellant being a citizen of India The finding recorded by the Election Tribunal was that the appellant was not a citizen of India, so that both Articles 173 and 191 applied and the election of the appellant was liable to be set aside It is against this decision that the appellant has come up in appeal to this Court.

The principal point we have to deal with in this appeal, consequently, is whether the appellant was or was not a citizen of India on the relevant dates when the election took place and he was declared duly elected to the U P Legislature In considering the question of citizenship, we have to take into account the provisions contained in the Constitution and the provisions of the Citizenship Act, 1955 Prior to the commencement of the Constitution persons residing in the territory of India were British subjects The citizenship of India

came into existence, for the first time under the Constitution when India became a Republic Article 5 of the Constitution recognized as a citizen of India every person who had his domicile in the territory of India and (a) who was born in the territory of India, or (b) either of whose parents was born in the territory of India or (c) who had been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement

Aslam Khan appellant had his original domicile in the territory of India and he was also born in the territory of India both his parents were also born in the territory of India Consequently if Article 5 of the Constitution could have been applied to him, he would have been a citizen of India, under this provision The Constitution in Article 7, however made an exception and laid down that—

> notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India

It is the admitted case of the parties that the appellant had left India after the first day of March, 1947 It appears that the appellant, in the year 1947, was in Government service He had the choice of opting for India or Pakistan and he opted for Pakistan In pursuance of this option exercised by him he actually went to Pakistan and served under the Government of Pakistan Later however, he resigned and came back to India in February, 1948 The contention of the appellant was that, even though he had opted for Pakistan he had never renounced, nor had been deprived of his Indian citizenship, nor had his Indian citizenship terminated under the Citizenship Act, 1955 It was further his case that he had not migrated from India to Pakistan, so that Article 5 of the Constitution applied to him and he became an Indian citizen at the time of the commencement of the Constitution This contention on behalf of the appellant cannot be accepted When the appellant opted for Pakistan, he clearly did

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so with the object of residing in Pakistan and continuing his service under the Government of Pakistan It was, according to his own admission, a final exercise of his option At that time persons opting were given the choice either to opt finally or to opt provisionally and give their final decision within six months The appellant chose to make a final option for Pakistan The mere fact therefore, that he later decided to come back in February 1948, cannot be construed as showing that his option for Pakistan was only temporary or provisional and that he had intended to continue to be a citizen of India and to come back to India The final exercise of option in favour of Pakistan was thus clear proof of the fact that he had migrated to Pakistan and this migration took place after the first day of March, 1947 As a result, his case is covered by Article 7 of the Constitution and the consequence is that Article 5 of the Constitution did not apply to his case at all It is to be noticed that the provision in Article 7 of the Constitution does not lay down that a person, who became a citizen of India under Article 5 would lose his Indian citizenship or would cease to be a citizen of India if he migrated to Pakistan The language used in Article 7 is that a person, who migrated to Pakistan after the first day of March, 1947, was not to be deemed to be a citizen of India notwithstanding anything in Article 5 The use of expression notwithstanding anything in Article 5 means that in such a case, Article 5 does not enure to the benefit of the person at all and he never becomes a citizen of India In the case of the appellant therefore the provisions of the Constitution would show that he never became a citizen of India in accordance with the principles laid down in the Constitution When the appellant came back to India in February, 1948, he was therefore, not a citizen of India and had never before that date been a citizen of India

It is in these circumstances that we have to see how and when the appellant acquired Indian citizenship, if at all For this purpose we have to examine the provision of the Citizenship Act 1955 Sections 3 and 4 of that Act confer citizenship on certain persons, but both these provisions apply to persons born on or after the 26th of January 1950 Admittedly, the appellant was

born long before that date and, consequently, sections 3 and 4 of the Citizenship Act, 1955 cannot possibly apply to him The appellant could, in these circumstances, acquire citizenship only by registration under section 5 of the Citizenship Act 1955 or by naturalization, under section 6 of that Act The case of the appellant is that he acquired Indian citizenship by registration under section 5 (1) (a) of the Citizenship Act, 1955 The contention on behalf of the contesting respondent no 1 was that the appellant was not entitled to registration under section 5 (1) (a) of the Citizenship Act 1955 but that his case fell under section 5 (1) (e) of the Act It was further pleaded that, even if the case of the appellant fell under section 5 (1) (a) of the Citizenship Act, 1955, section 5 (3) of that Act applied to him The reason for these contentions by the two parties is that a person covered by the provisions of section 5 (1) (a) of the Act can obtain registration from the Collector of a district, whereas the persons whose cases fall under section 5 (1) (e) or section 5 (3) of the Citizenship Act, 1955, can obtain registration only from the Central Government The appellant has filed a certificate of his registration as an Indian citizen granted by the Collector of Rampur dated the 31st of August, 1956 The certificate purports to register the appellant as a citizen of India under section 5 (1) (a) of the Citizenship Act, 1955 It is the validity of this certificate that has been main subject matter of controversy between the parties in this case

We have already indicated above when discussing the provisions of the Constitution that the appellant did not become a citizen of India at the commencement of the Constitution or when he returned to India in February 1948 Subsequently, he could only acquire citizenship, as has been mentioned above by obtaining an appropriate certificate under section 5 or section 6 of the Citizenship Act 1955 The only certificate that has been obtained by the appellant is the one, dated the 31st of August 1956 granted by the Collector of Rampur Prior to that certificate no other certificate was obtained by the appellant Consequently until this registration on 31st August, 1956 the appellant had never been a citizen of

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India If he was never a citizen of India, no question could arise of his being deprived of Indian citizenship or of his having renounced Indian citizenship or of his Indian citizenship having terminated under the Citizenship Act 1955 The question of renunciation deprivation or termination of Indian citizenship could only arise in the case of a person who was already a citizen of India The appellant having never been a citizen of Indian prior to the date of his registration, no such question could arise in his case so that it is clear that his case cannot possibly be governed by section 5 (3) of the Citizenship Act, 1955 No doubt, the Citizenship Act 1955, contains provisions in sections 8 9 and 10 for renunciation deprivation and termination of citizenship, but those provisions could not apply to the case of the appellant who had never been an Indian citizen before his registration on 31st August 1956 In these circumstances the plea taken on behalf of respondent no 1 that the case of the appellant was governed by section 5 (5) of the Citizenship Act 1955, clearly fails

Next we come to the question whether the appellant s case for registration falls under clause (*a*) or (*e*) of sub section (1) of section 5 of the Citizenship Act, 1955 The requirements of clause (*a*) are that a person seeking registration must be of Indian origin and must be ordinarily resident of India and has been so resident for six months immediately before making an application for registration We have already stated above that it is the admitted case of the parties that the appellant was born in India and so were his parents so that he is a person of Indian origin The next requirement that he must ordinarily be resident of India is also satisfied The evidence on the record discloses that, since his birth he had lived in India until he migrated to Pakistan in August, 1947 He returned from Pakistan to India in February, 1948 and thereafter he continued to reside in India right up to the 31st of August 1956 when the certificate was granted to him as also up to the slightly earlier date when he made his application for registration to the Collector of Rampur It would thus appear that the appellant has lived in India during the whole of his life except

for a brief period of about six months between August, 1947 and February, 1948 It is true that, for those six months, he had gone to Pakistan and had gone with the specific object of migrating from India The mere fact that he did so for a brief period of six months cannot mean that he has not continued to be ordinarily resident in India Even a person of any other nationality can be ordinarily resident in India if he resides in India for most of his life and goes out of India only for brief periods In the case of the appellant, he went out of India for a short period of six months during his life of about 45 years and, consequently, it must be held that he has been ordinarily resident in India and was ordinarily resident in India when he applied for registration There is, of course, no dispute at all that the third qualification that he had been resident in India for six months before making an application for registration is also satisfied by the appellant It thus appears that all the requirements of section 5 (1) (a) of the Citizenship Act, 1955, are satisfied by the appellant and his case does fall under that provision of law under which the registration certificate could be validly granted to him by the Collector of Rampur, who was the prescribed authority for the purpose

There is however, the question whether the appellant s case is also covered by the provisions of clause (e) of sub-section (1) of section 5 of the Citizenship Act 1955, and, if so, what would be its effect on the question as to who would be the appropriate authority from whom he had to obtain the certificate of registration Persons falling under clause (e) of sub-section (1) of section 5 of that Act are those who are of full age and capacity and are citizens of a country specified in the First Schedule The countries specified in the First Schedule are nine in number and they include Pakistan The contention on behalf of the respondent was that the appellant, at the time of his registration was a citizen of Pakistan which is one of the countries enumerated in the First Schedule and being of full age and capacity, he could apply for registration only under section 5 (1) (e) of the Citizenship Act, 1955 The word citizen for the

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purpose of the Citizenship Act, 1955 is defined in section 2 (1) of that Act as

> 2 (1) (*b*)—Citizen, in relation to a country specified in the First Schedule, means a person who under the citizenship or nationality law for the time being in force in that country is a citizen or national of that country

Further, section 2 (1) (*c*) of the Citizenship Act 1955 defines citizenship or nationality law in the following words

> 2 (1) (*c*)—Citizenship or nationality law in relation to a country specified in the First Schedule means an enactment of the legislature of that country which at the request of the Government of that country the Central Government may by notification in the official Gazette, have declared to be an enactment making provision for the citizenship or nationality of that country

There is a proviso to this definition referring to the Union of South Africa with which we are not concerned, so that it need not be quoted It is to be noticed that section 5 (1) (*e*) which we are being asked to apply in the case of the appellant governs persons who are citizens of a country specified in the First Schedule The word citizen defined in section 2 (1) (*b*) of the Citizenship Act, 1955, also refers to the countries specified in the First Schedule so that the word citizen used in section 5 (1) (*e*) has to be given the meaning given to it in the definition contained in section 2 (1) (*b*) Again in the definition of the word citizen contained in section 2 (1) (*b*), there is reference to citizenship or nationality law which is itself defined in section 2 (1) (*c*) The consequence is that section 5 (1) (*e*) of the Citizenship Act, 1955 can be applied to the case of a person only if that person satisfies the requirements contained in the definition of the word citizen' in section 2 (1) (*b*) and, in deciding this question the citizenship or nationality law to be taken into consideration must be one satisfying the requirements of section 2 (1) (*c*) of that Act In these circumstances, we called upon learned counsel for the respondent no 1 to point out

to us any notification by the Central Government in the official *Gazette* declaring any enactment of the Government of Pakistan to be an enactment making provision for the citizenship or nationality of Pakistan No doubt, a Citizenship Act was passed in Pakistan which is designated as the Pakistan Citizenship Act 1951 A copy of that Act was also available to us in print but learned counsel for respondent no 1 was unable to point out or show to the Court any notification by the Central Government in any official *Gazette* declaring the Pakistan Citizenship Act, 1951, to be an enactment making provision for the citizenship or nationality of Pakistan The Pakistan Citizenship Act, 1951 does not therefore, satisfy the requirements of a citizenship or nationality law laid down in the definition in section 2 (1) (c) of the Citizenship Act 1955, and hence the Pakistan Citizenship Act 1951, cannot be applied to the case of the appellant and it cannot be held that he was at any time a citizen of Pakistan It appears that when the appellant migrated to Pakistan in August 1947, he lost the benefit of Article 5 of the Constitution and never became a citizen of India Subsequently he returned to India in February 1948 having very possibly acquired the citizenship of Pakistan, which citizenship might have been subsequently recognized by the Pakistan Government in accordance with the Pakistan Citizenship Act 1951 So far as India was concerned no declaration was made in respect of the Pakistan Citizenship Act, 1951, by the Central Government so as to constitute it into a citizenship or nationality law so that for purposes of applying the provisions of the laws in force in India and for the purpose of considering the citizenship of the appellant in India, the appellant could not be recognized as a citizen of Pakistan In February, 1948, therefore when he came back to India, he was neither a citizen of India nor a citizen of Pakistan When we have said that he was not even a citizen of Pakistan, we do not mean that Pakistan might not have recognized him as one of its citizens What we mean is that India did not recognize him as a citizen of Pakistan The appellant, not being recognized as a citizen of Pakistan, could not therefore come within the provisions of section 5 (1)

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(e) of the Citizenship Act, 1955, and, consequently, any application for registration made by him could not be governed by this provision of law. In this view it is unnecessary to go into the further question whether if the appellant's case had fallen simultaneously within the scope of clause (a) as well as clause (e) of sub-section (1) of section 5 of the Citizenship Act, 1955 the registration could have been validly granted by the Central Government only or also by the Collector. In the case of the appellant, section (1) (e) of the Citizenship Act, 1955, does not apply and as we have held above, he does satisfy all the requirements of section 5 (1) (a) of that Act. He could therefore be registered as a citizen of India by the Collector of Rampur who was the prescribed authority and, hence, the certificate of registration as a citizen of India granted to the appellant on the 31st of August, 1956, by the Collector of Rampur conferred citizenship of India on the appellant. The election took place subsequent to that date and, consequently, on all relevant dates he was a citizen of India and, therefore, there was no bar to his being chosen to fill a seat in the U. P. Legislature either under Article 173 or Article 191 of the Constitution. The ground, on which the election petition was allowed by the Election Tribunal against the appellant must therefore, be decided in favour of the appellant and he is entitled to succeed in this appeal.

As we have mentioned at the outset, respondent no. 1 had taken various other grounds for challenging the election of the appellant, the grounds being those of commission of various corrupt practices. We called upon learned counsel for respondent no. 1 to inform us if he wanted to support the decision of the Election Tribunal on any of those grounds and, if so, to put forward his arguments and convince us that the findings recorded by the Election Tribunal in favour of the appellant on those points are liable to be set aside in this appeal. The learned Judge of the Election Tribunal had to judge the evidence of the witnesses on those various grounds and he has given full and cogent reasons for recording findings on all those grounds in favour of the appellant. Learned counsel for respondent no. 1

was unable to advance any arguments which could possibly induce us to differ from the view taken by the Election Tribunal and to set aside any of those findings which must be given their due weight, as the Judge, who recorded those findings had the benefit of seeing the witnesses in the witness box It does not appear to be necessary in these circumstances for us to examine those findings in detail

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Bhargava, J

The appeal is consequently allowed the order of the Election Tribunal set aside and the election petition filed by respondent no 1 is dismissed with costs in this Court as well as before the Election Tribunal The costs in this Court as well as before the Election Tribunal shall be Rs 200 in this Court and the same amount for the proceedings before the Election Tribunal

Appeal allowed

APPELLATE CIVIL

Before Mr Justice Chaturvedi and Mr Justice Takru

1959

January 12

KESHAV GUPTA (APPELLANT)

v

GHAYUR ALI KHAN (RESPONDENT)

Election Petition—*Proceedings in, whether of a civil nature for purposes of appeal to the Supreme Court—Constitution of India* 1950 *Art* 133—*Code of Civil Procedure* 1908 *ss* 9 108 *and* 110—*Representation of the People Act* 1951 *ss* 116 *A and* 116 *B Vakalatnama—Stage up to which continues to remain in force—Necessity for filing a fresh in a petition for leave to appeal to the Supreme Court—Rules of Court,* 1952 *Ch I r* 2—*Code of Civil Procedure* 1908 *O III r* 4

Appeal to the Supreme Court—Certificate from High Court for—When the case is a fit one for appeal to the Supreme Court —Constitution of India, 1950 *Art* 133 (1) (*c*)

The right to vote for or be elected to a seat in the legislature or Municipal bodies is a civil right and the litigation for enforcing or securing the same is a civil proceeding within the meaning of Art 133 of the Constitution A petition for leave to appeal to the Supreme Court from the judgment of the High Court under the Representation of the People Act 1951 is accordingly maintainable under the said Article

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KESHAV GUPTA v. GHAVER ALI KHAN

Quaere whether the petition could be entertainable under ss 109 and 110 of the Code of Civil Procedure?

Hamid Hasan Nomani v *Banwarilal Roy* (1) *applied*

Ponnuswami v *Returning Officer* (2) *and Inamati Mallappa Basappa* v *Desai Basawaraj Ayyappa* (3) distinguished *V V Giri* v *Dippala Suri Dora* (4) disapproved The Vakalatnama executed and filed in a case unless restricted or determined otherwise continues to remain in force till all the proceedings in the case are concluded so that there is no need to file a fresh Vakalatnama with the petition for leave to appeal to Supreme Court by a counsel who has filed the same in the appeal to the High Court or (semble) even at the earlier stage

A case involving the determination of the scope of corrupt practice relating to for instance systematic appeal to voters on grounds of community or religion national symbol and its use election expenses and its accounts is a case of general and public importance and is therefore a fit case for appeal to the Supreme Court under Article 133 (1) (*c*) of the Constitution

Case law discussed

Supreme Court Appeal no 230 of 1958 in First Appeal no 109 of 1958

The facts appear in the judgment

Shanti Bhushan for the appellant

The Judgment of the Court was delivered by—

CHATURVEDI, J —This is an application under Article 133 of the Constitution praying for the grant of a certificate that the case is a fit one for appeal to the Supreme Court of India It arises under the following circumstances

The parties to the application were candidates for election to a seat in the U P Legislative Assembly As a result of the poll, the respondent obtained 25,983 votes and the applicant 25,258 votes The respondent was accordingly declared as the duly elected candidate, and the applicant filed an election petition challenging the respondent s election The main grounds taken in the petition were that the respondent, his workers agents and supporters made systematic appeals, held meetings and printed and distributed handbills to the Muslim voters of the constituency inducing them to vote

(1) A I R. 1947 P C 90
(2) 1952 S C R. 218
(3) A I R 1958 S C 698
(4) A I R 1958 A P 642

for the respondent and refrain from voting for the applicant on the ground of community and religion that the respondent his agents workers and supporters made extensive use of certain posters bearing the photograph of Mahatma Gandhi and his advice Congress ko tor do (the Congress organization should be dissolved) and thus made the use of a national symbol for the purpose of reducing the votes of the applicant and increasing those of the respondent and that the respondent did not maintain accounts as required by section 77 of the Representation of the People Act

The Election Tribunal held that the respondent was guilty of the commission of the corrupt practice of making systematic appeals to the Muslim voters to vote for the respondent on the ground of his community and religion that the voters were made to believe that they would become objects of Divine displeasure and spiritual censure if they did not vote for the respondent and that a pamphlet styled *kya is Congress ko phir vote diya jaye* , (should votes be cast in favour of the Congress candidate again) contained false statements and misrepresentations and preached hatred against the members of the Congress organization and interfered with the free exercise of the electoral right of the voters The points raising other grounds were decided against the applicant, but the election of the respondent was declared to be void on the findings mentioned above The respondent filed an appeal in this Court and this Court did not agree with the Election Tribunal in its decision on any of the points decided by it against the respondent and allowed the appeal This Court agreed with the decision of the Tribunal with respect to the points which were decided by the Tribunal in favour of the respondent and the correctness of which was challenged in appeal before the Court The applicant now wants to take the case to the Supreme Court

No arguments were addressed to us at the time of the hearing of the application that the applicant was entitled to a certificate under clauses (*a*) and (*b*) of sub Article (1) of Article 133 of the Constitution, though the application mentioned those clauses also The reason

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Chatterjee J.

for this appears to be that this is not a case in which it can be said that the amount or value of the subject matter in dispute in the court of first instance and in dispute on appeal was Rs 20,000 or more Even in the application it is nowhere alleged that the value of the subject matter in dispute was Rs 20 000 During the arguments the learned counsel only urged that the case raised questions of general and public importance and was a fit one for appeal to the Supreme Court We thus proceeded to consider whether the applicant is entitled to a certificate under Article 133 (1) (*c*) of the Constitution which is as follows

> An appeal shall lie to the Supreme Court form any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—
>
> (*a*)
>
> (*b*)
>
> (*c*) that the case is a fit one for appeal to the Supreme Court of India

The learned counsel for the respondent has urged three points in opposing the application He has contended (1) that this Court has no jurisdiction to grant a certificate as the judgment or final order passed by the High Court was not in a civil proceeding , (2) that the application for the grant of a certificate was not properly presented as the learned counsel who presented it, did not file his Vakalatnama along with his application and (3) that the case did not raise any substantial questions of law of general or public importance The learned counsel for the applicant in the alternative contended that he was entitled to a certificate under sections 109 and 110 of the Code of Civil Procedure

The first question that arises for decision is whether this Court has jurisdiction to grant the certificate and that depends upon the interpretation of the words civil proceeding The learned counsel for the applicant has contended that the proceedings arising out of election matters are matters concerning disputes to civil

rights and thus give rise to civil proceedings According to the learned counsel some civil rights have been recognized by common or general law of the land and other civil rights are conferred by the statutes The fact that a right has been conferred by the statute does not imply that the right is not of a civil nature The learned counsel for the respondent has urged that the right to franchise or to seek election to a legislative body is not a civil right but is in the nature of a political right which has been conferred upon the citizen by the Constitution and the Representation of the People Act The right is not of a civil nature but is a special right created by a statute

The other Articles of the Constitution which may be considered in this connection are Articles 132, 134 and 136 Article 132 (1) is in the following words

> An appeal shall lie to the Supreme Court from any judgment decree or final order of a High Court in the territory of India whether in a civil criminal or other proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution

Article 134 (1) provides for an appeal to the Supreme Court from any judgment final order or sentence in a criminal proceeding of the High Court Article 136 (1) empowers the Supreme Court to grant special leave to appeal from any judgment decree determination sentence or order in any cause or matter passed or made by any court or Tribunal in the territory of India excepting a court or Tribunal constituted by or under any law relating to Armed Forces

From the above provisions it would appear that if a case involves the determination of a substantial question of law as to the interpretation of the Constitution the High Court is required to give the certificate under Article 132 (1) irrespective of the fact whether the judgment of the High Court was delivered in a civil criminal or other proceeding Article 132 (1) thus does not divide all the proceedings between civil and criminal and contemplates other proceedings which are neither civil nor criminal Article 133 (1) provides for appeal

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in a civil proceeding and Article 134(1) in a criminal proceeding There is no provision of a certificate by the High Court in a proceeding which is neither civil nor criminal The powers of the Supreme Court under Article 136 to grant special leave are of the widest amplitude Under Article 133 (1) we shall be entitled to grant a certificate only if the judgment of this Court can be said to have been given in a civil proceeding

The expression civil proceeding has not been defined in the Constitution and the expression has to be given its ordinary dictionary meaning The word civil is derived from the Latin word civis meaning a citizen The word civil when used as an adjective to law has been defined in the Shorter Oxford Dictionary as pertaining to the private rights and remedies of a citizen as distinguished from criminal political etc The word political has been given the meaning as belonging or pertaining to the State its Government and policy public civil of or pertaining to the science or art of politics In Stroud's Judicial Dictionary the expression civil proceeding is given the meaning as a process for the recovery of individual right or redress of individual wrong The meaning of the word political as given in Shorter Oxford Dictionary does not rule out the possibility of a political right being also considered as a civil right In every democratic country the right of franchise is considered to be a very valuable right and though the exercise of the right results in electing members to legislative bodies which have political power the nature of the right is essentially of a civil character

No direct authority on the point has been produced before us excepting a decision of the Andhra Pradesh High Court which we shall presently consider The meaning of the expression civil proceeding came up for consideration in two reported cases of this Court, namely, *State of U P* v *Mukhtar Singh* (1) and *Brij Lal Suri* v *State of U P* (2) In both these cases the point raised was that proceedings under Article 226 of the Constitution were not civil proceedings within the

(1) A. I. R. 1957 All. 505 (2) A. I. R. 1958 All. 521

meaning of the expression as used in Article 133 (1) of the Constitution In the first case there was a difference of opinion between the members constituting the Bench and in the second case both the Judges, by separate but concurrent judgments held that it would depend on the nature of each case decided under Article 226 of the Constitution whether the proceeding giving rise to it was civil, criminal or other proceeding If the order passed by the High Court is in regard to a proceeding which relates to determination of individual rights or redress of individual wrongs then it would be an order passed in a civil proceeding But neither of the above two cases is of any real help in determining the particular question that arises in the present case In neither of these cases this Court had to consider whether a right to seek election to a legislative body is a civil right or not

The Privy Council had to deal with a point of somewhat similar nature in the case of *Hamid Hasan Nomani v Banwarilal Roy* (1) The Municipality of Howrah had been superseded by an order of the Governor of Bengal and the Governor directed that Hamid Hasan Nomani should exercise and perform all the powers and duties which might be exercised or performed by or on behalf of the Chairman and the Commissioners during the period of the suspension The legality of the order appointing Hamid Hasan Nomani to act as the Chairman and Commissioner during the period of the suspension of Howrah Municipality was challenged before the High Court at Calcutta The High Court issued a rule nisi calling upon the appellant to show cause why an information in the nature of *quo warranto* should not be exhibited against him Subsequently this rule was made absolute by the High Court An appeal was taken to the Privy Council against the order of the High Court and the main question decided by the Privy Council was that the High Court had no power to issue the rule because it had not inherited the personal jurisdiction of the Supreme Court over certain classes of persons residing outside the territorial limits

(1) A I R 1947 P C 90

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of its ordinary original civil jurisdiction While considering the above question the Privy Council had to see whether the jurisdiction exercised by the High Court was ordinary original and civil jurisdiction The Privy Council held

> It cannot be disputed that the issue of such writs is a matter of original jurisdiction As to its being of a civil nature, it was held as long ago as 1788 *King* v *Francis* (1) that information in the nature of *quo warranto* is in the nature of a civil proceeding so that a new trial may be ordered '

They then went on to consider the question whether it was within the ordinary jurisdiction of the High Court The decision is an authority for the proposition that information in the nature of *quo warranto* respecting the legal authority of a person to act as a Municipal Commissioner is a proceeding of a civil nature The question before us is of a similar nature and we think that for the same reasons the proceeding relating to the legality of the declaration of a person to be a duly elected member of the legislature is also of a civil nature

Section 9 of the Code of Civil Procedure provides that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred The decisions under this section and section 42 of the specific Relief Act would be relevant and the weight of authority is overwhelmingly in favour of the view that a right to seek election to a Municipal Board or a Municipal Corporation is a right of a civil nature The same principle we think, should apply to a right to seek election to the legislatures of the State and the Union

In *Sabhapat Singh* v *Abdul Gaffur* (2) it was held that the plaintiff could bring a suit in the civil court for the declaration that he was a duly elected member of a local body In *Ataul Haq* v *The Chairman* (3) it was held that the plaintiff could bring a suit in the civil court for a declaration that he was a qualified voter and could have his name entered in the register of voters

(1) (1788) 2 Term Rep 484 (2) (1897) I L R 24 Cal 179
(3) (1952) I L R 48 Cal 378

of a Municipal Board. The same view has been expressed in the case of *Maqsuddin Khan* v. *Janki Ballabh Dutta* (1). In *Gopesh Chandra* v. *Benode Lal Das* (2), it was held that the plaintiff was entitled to bring a suit in a civil court for a declaration that his nomination paper was illegally rejected and the defendant was not duly elected to the Municipal Board. The view of the Calcutta High Court thus appears to be consistent that such a suit is of a civil nature and can be brought in the civil court.

A similar view has been expressed by the Bombay High Court in the case of *K. F. Nariman* v. *Municipal Corporation* (3), by the High Court of Madras in the case of *A. Doraswami Nadar* v. *Joseph L. Mother* (4), and by the Patna High Court in the case of *Jodhi Singh* v. *Vedaharat Sharma* (5).

The learned counsel for the respondent relied on certain observations of the Supreme Court in the case of *Ponnuswami* v. *Returning Officer* (6). Reliance was placed on the following passage which occurs at page 236 of the Report:

> The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

It has been argued that their Lordships have laid down that the right to vote or stand as a candidate for election is not a civil right. After giving a most careful consideration to the argument and the facts of the case in which the observation has been made, we find ourselves unable to accept the interpretation put upon the above passage by the learned counsel for the respondent. The passage occurs in the well known case where the Supreme Court has laid down that the word "election" has been used in Article 329 (*b*) of the Constitution in the wider sense as connoting the entire process culminating in a candidate being declared elected. They held

(1) (1933) I. L. R. 60 Cal. 438.
(2) A. I. R. 1936 Cal. 424.
(3) (1924) I. L. R. 48 Bom. 809.
(4) A. I. R. 1926 Mad. 319.
(5) A. I. R. 1956 Pat. 205.
(6) 1952 S. C. R. 218.

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that the process of election began earlier than the presentation of the nomination paper and Article 329 (*b*) prohibited all courts from interfering with the orders passed during the course of the elections. Even after that the objections could be taken only by means of an election petition. It was accordingly held that no writ petition under Article 226 of the Constitution could be filed during the course of the election. The learned Judges had not to consider whether the words "civil proceeding" in Article 133 (1) of the Constitution included proceedings arising out of an election matter. Coming now to the observation relied on by the learned counsel, the observation was made after a reference to a speech of a Lord Chancellor of England in the case of *Theberge* v. *Landry* (1). In the speech the Lord Chancellor had said that the subject matter of the legislation was extremely peculiar which concerned the rights and privileges of the electors and of the Legislative Assembly and that right had been jealously guarded by the Assembly. It would be surprising with regard to the rights and privileges of this kind if it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly or to the Superior Court which the Assembly had put in its place but belonged to the Crown in Council. It was accordingly held that no appeal lay to the Privy Council in a case of that kind. The said observations are not applicable to the Supreme Court of India. The learned Judges of the Supreme Court then said that one of the points which emerged from the above decision, was that the right to vote or stand as a candidate for election was not a civil right but was a creature of the statute or special law and must be subject to the limitations imposed by it. What their Lordships clearly meant was that the right to vote or stand as a candidate was not the ordinary type of civil or common law right but was a right which had been created by a special statute. The words "civil right" were used in contradistinction to a right created by a statute but it was not meant that no right created by a statute could give rise to a civil right.

(1) L. R. [1876] 2 A. C. 102

The learned counsel for the respondent also referred to another decision of the Supreme Court reported in the case of *Inamati Mallappa Basappa* v *Desai Basavaraj Ayyappa* (1) In this case their Lordships have held that the provisions of Order XXIII, rule 1 of the Code of Civil Procedure do not apply to election petitions and it is not open to a petitioner to withdraw or abandon a part of his claim once an election petition has been presented to the Election Commission The observations relied upon by the learned counsel are to the effect that an election contest is not an action at law but is a statutory proceeding unknown to the common law and that the court possesses no common law power in such a contest It is not a matter in which the only persons interested are the candidates but the public also is substantially interested in the result An election petition is not a suit between two persons but a proceeding in which the constituency itself is the principal party interested There is no question that the above observations lay down the accepted view of law concerning the nature of an election petition But the observations do not militate against the view that the rights determined in an election petition are rights adjudicated upon in a civil proceeding We do not think that in the case of *Inamati Mallappa Basappa* (1) and in the Supreme Court cases relied upon in that case their Lordships of the Supreme Court meant to lay down that an election petition does not determine civil rights

A Bench of the High Court of Andhra Pradesh in the case of *V V Giri* v *Dippala Suri Dora* (2) has held that no certificate can be granted by a High Court under Article 133 (1) of the Constitution against the judgment passed in an appeal under section 116 A of the Representation of the People Act, because the election proceedings did not come within the meaning of the expression civil proceeding' This case fully supports the contention of the learned counsel for the respondent and is the only case brought to our notice on the point but, after having respectfully

(1) A I R 1958 S C 698 (2) A. I R. 1958 A P 642.

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considered the judgment of the learned Judges we find ourselves unable to agree with that view The Andhra Pradesh High Court has based its decision on the passage quoted by us above from the decision of the Supreme Court in the case of *Ponnuswami* (1) We have come to the conclusion that the passage in the context in which it has been used only meant that a right of this nature was not a common law right but a right created by a statute After a most careful consideration of the question we have arrived at the conclusion that the proceedings arising out of an election petition are proceedings of a civil nature and this Court under Article 133 (1) of the Constitution can certify such a case to be a fit one for appeal to the Supreme Court

The next contention of the learned counsel for the respondent was that the application for the grant of a certificate had not been properly presented because it was not accompanied by a Vakalatnama executed by the applicant in favour of the learned counsel We looked into the record of the appeal out of which the present application arises, and we found that the learned counsel for the applicant had filed his Vakalatnama in the appeal The terms of the Vakalatnama are very wide conferring, amongst others, the following powers on the learned counsel

> The aforesaid gentleman may file on my behalf plaint written statement grounds of appeal or revision etc of every kind and file copies of all other kinds of applications and documents and file a compromise and file an application in that connection and support it i e take singly or jointly all proceedings connected therewith up to the time of full satisfaction of the decree and if necessary engage any other vakil

Power has been conferred on the counsel to file all kinds of applications and that power is to continue till the final stage of the case namely the execution of the decree We accordingly think that it was not necessary for the learned counsel to file another Vakalatnama along with this application We think he was authorized by the previous Vakalatnama filed in the appeal

(1) 1952 S C R 218

to present this application as well We accordingly decide this point also against the learned counsel for the respondent

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The learned counsel for the applicant had argued in the alternative that he was entitled to a certificate under sections 109 and 110 of the Civil Procedure Code It is doubtful if any certificate can be granted under the above sections of the Code of Civil Procedure in view of the language used in section 116 A (2) and section 116 B of the Representation of the People Act But we do not consider it necessary to decide this point

We now come to the last question whether this case raises any question of general and public importance and should be declared to be a fit one for appeal to the Supreme Court After having heard the learned counsel for the parties, we have arrived at the conclusion that two of the questions decided by the High Court are questions of law of general and public importance and deserve an authoritative decision by the highest Court in the country One of the questions is when an appeal to vote in favour of a candidate or to refrain from voting in favour of the other can be said to be an appeal made on the ground of religion or community In this case one of the handbills contained the following appeal

> And this is the advice of respected Maulana, (Maulana Husain Ahmad Madni), too because he could never advise to vote for a Government which has insulted the respected leader by search of Darul Ulum Deoband and has further suppressed Urdu which is our mother tongue Therefore we appeal to the Muslim brothers of Thana Bhawan to help Ghayur Ali Khan to win by casting their votes in his favour '

The other handbill contained the following appeal

> Should such Congress be voted for once again? Whose police has insulted respected Hazrat Sheikh Maulana Sayeed Husain Ahmad Madni by making a search raid on Darul Ulum Deoband

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Whose Government of U P has mercilessly rendered lacs of persons to speechlessness by not recognizing Urdu as one of the regional languages

Whose leadership tried to obtain Muslim votes by mean tactics of terrifying the Muslim minority by referring to the Kashmir problem

The Election Tribunal had held that the respondent was responsible for the publication of both the handbills but this Court did not agree with that finding as regards the first handbill the relevant portion of which has been quoted above The question whether the respondent was responsible for the publication of this handbill was decided in favour of the respondent and the decision was based on a consideration of evidence It was a decision on a question of fact But as regards the second handbill this Court agreed with the decision of the Election Tribunal that the handbill had been printed at the instance of the respondent We have quoted the relevant portions of the handbill, and the Bench, which decided the appeal, took the view that the handbill contained only a criticism of the actions or omissions of a political party in power and did not amount to making of an appeal on the ground of religion or community The first and third quotations referred to improper actions of certain individuals, which were likely to be presented even by members of the other community and the second passage was concerning the language policy of the political party in power in the State of U P But such speeches are made during the elections and questions have arisen in many of the election petitions whether statements of this kind amount to appeals on the ground of religion or community

The other question is whether Mahatma Gandhi s photograph can be called a national symbol The respondent had made use of posters containing Mahatma Gandhi s photograph but the Bench held that Mahatma Gandhi's photograph could not be called a national emblem or symbol, so that the use of it did not amount to the commission of a corrupt practice Nor did the publication of Mahatma Gandhi s alleged statement that

the Congress organization should be dissolved amount to the exercise of undue influence

The third question is whether the omission by the candidate himself to keep and maintain accounts as provided by section 77 of the Representation of the People Act was a corrupt practice as defined by section 123 (6) of the Act The Bench held that the corrupt practice mentioned in section 123 (6) was confined to the disobedience of sub-section (3) of section 77 and not to disobedience of the other two sub sections The Bench took the view that the corrupt practice was the authorizing or incurring of expenditure above the maximum prescribed by the rules and the omission to keep and maintain accounts by the candidate himself did not fall within the purview of section 123 (6) of the Act

The above are questions of general and public importance on which an authoritative pronouncement is called for We accordingly think that this case is a fit one for appeal to the Supreme Court and we allow this application and grant a certificate to the above effect under Article 133 (1) (c) of the Constitution

Application allowed

(FULL BENCH) CIVIL MISCELLANEOUS

Before Mr Justice Bhargava, Mr Justice Chaturvedi and Mr Justice Upadhya

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May, 15

JAI KISHAN SRIVASTAVA (PETITIONER)

v

INCOME TAX OFFICER KANPUR AND ANOTHER (OPPOSITE-PARTIES)

Income escaping assessment during war period—*Provision for assessment or re assessment—Constitutionality of—Indian Income Tax Act 1922 s 34 (1 A)—Constitution of India,* 1950, *Art* 14

Power of assessment—Exercise of, by the Income Tax Officer—Whether biased and transgressing principles of natural justice—Validity of proceedings

The petitioner had been duly assessed to income-tax for the assessment years 1940-41 to 1946-47 In December 1954 he

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received seven notices under s 34 (1 A) of the Income Tax Act for submitting a further return of his total income for each of the said assessment years In a petition challenging the validity of the proceedings

Held (i) (*Per* BHARGAVA and CHATURVEDI JJ UPADHYA J *contra*) that s 34 (1 A) of the Income Tax Act did not violate the prohibition contained in Art 14 of the Constitution and was a valid piece of legislation because

(a) the assessee proceeded against under s 34 (1 A) had with regard to appeal revision or reference the same rights as one under s 34 (1) since notwithstanding the difference in the phraseology of the corresponding provisions in the two sections viz and thereupon the provisions of this Act [excepting those contained in cls (i) and (m) of the proviso to sub s (1)] shall so far as may be, apply accordingly in the former and the provisions of this Act shall as far as may be apply accordingly as if the notice were a notice issued under [section 22 (2)] in the latter s 23 (2) was equally applicable to both cases

(b) the difference resulting from the fact that the proceedings under s 34 (1) was subject to a prescribed period of limitation while that under s 34 (1 A) was free from any such restriction fell within the limits of permissible classification inasmuch as the latter was meant for a special class of evaders whose income during the war period amounted to a lakh of rupees or more

(*Per* UPADHYA J) —that the additional words as if the notice were a notice issued under [s 22 (2)] in s 34 (1) were not superfluous and could not be imported into s 34 (1 A) with the result that the provisions regarding appeals etc could not be available to an assessee proceeded against under the latter section The provisions of and the proceedings under s 34 (1 A) therefore offended Art 14 of the Constitution and were accordingly invalid.

Observations of the Supreme Court in *Shree Meenakshi Mills Ltd* v *Sri A V Viswanatha Sastri* (1) relied on by BHARGAVA J explained on the ground that the relevant point therein was assumed and could not in any sense be said to have been decided

(2) (Unanimously) that the proceedings before the Income Tax Officer were no doubt judicial It is however difficult to see how the Income tax Officer may be said to have a bias or personal interest in the matter of assessment so as to violate the principles of natural justice that no one can be a judge in his own cause and even assuming it to be so, the defect is cured by a provision for appeal and hearing before higher

(1) (1954) 26 I T R 713

and wholly independent tribunals Moreover the principles of natural justice cannot be invoked for attacking the validity of an express provision to the contrary in the Act

Gullapalli Nageswara Rao v Andhra Pradesh State Transport Corporation (1) distinguished

Civil Miscellaneous Writ No 397 of 1955 connected with Civil Misc Writ No 469 of 1955

The facts appear in the judgment

G S Pathak, G P Tandon and *R S Pathak* for the applicant

Jagdish Swarup and *Gopal Behari* for the opposite parties

BHARGAVA, J —These two connected writ petitions under Article 226 of the Constitution have been referred for decision to the Full Bench as they raise important questions relating to the validity of certain provisions of the Income Tax Act, hereinafter referred to as the Act) For convenience I am giving the facts of one of these writ petitions, which is numbered 397 of 1955 in which the petitioner is Jai Kishan Srivastava The petitioner, on the basis of returns submitted by him to the Income tax Officer Kanpur was assessed to tax for the assessment years 1940 41 to 1946 47 Thereafter on the 17th of May, 1948 he received notices from the Secretary, Income tax Investigation Commission by which he was informed that his case had been referred to the Commission under section 5 (1) of the Taxation on Income Investigation Act 1947 By these notices the petitioner was directed to furnish to the Income tax Investigation Commission certain information and to comply with certain other requirements mentioned therein The petitioner under the impression that the Commission had authority and jurisdiction to proceed with the investigation of the petitioner s case supplied most of the information sought and complied with the various requisitions The Income tax Investigation Commission did not however proceed to the stage of framing any charges against the petitioner or giving a hearing to him and was wound up before the proceedings could be completed

(1) A I R 1959 S C 308

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Thereafter on the 29th of December, 1954, the petitioner received seven notices purporting to be issued under section 34 (1 A) of the Act from the Income tax Officer, district I (ii) Kanpur, opposite party no. 1 calling upon him to submit returns of his total income assessable to tax for the seven assessment years mentioned above. The notices contained a mention that in case the petitioner failed to file the returns as required, he was liable to *ex parte* assessment under section 23 (4) of the Act and also to penalty and prosecution. Thereupon, the petitioner sent a letter dated the 29th of January, 1955, asking for two months' time to obtain legal advice and to prepare returns. Time was allowed to him up to the 28th of February, 1955. The petitioner asked for further time by his letter, dated the 26th of February, 1955, when he was informed by the Income tax Officer, Central Circle 1, Kanpur, opposite party no. 2, that his case had been transferred to his file and that no further time could be allowed, so that the petitioner must file his returns within three days. The petitioner made further representations and then he was allowed time up to the 25th of March, 1955. The petitioner sent a letter, dated the 24th of March, 1955, requesting the opposite party no. 2 to supply him with the reasons for the issue of notices under section 34 (1 A) of the Act, as recorded by him and forwarded to the Central Board of Revenue for their satisfaction and to grant further time to the petitioner, but by his letter dated the 31st of March, 1955, opposite party no. 2 refused these requests. Thereupon the petitioner, under protest, filed his returns of income. The petitioner also pointed out to opposite party no. 2 that according to him, the notices were bad in law and untenable and requested the opposite parties, viz., both the Income tax Officers, to recall the notices and to abandon the proceedings being taken under them, but the opposite parties did not accept this request. Thereupon, the petitioner moved this petition on the 25th of April, 1955, and this Court, when admitting the petition, passed an interim order restraining the opposite parties from taking any steps in pursuance of the notices given to the petitioner, under section 34 (1 A) of the Act.

The validity of the notices and the proceedings being taken under these notices were challenged by the petitioner on a number of grounds, but only two grounds need detailed consideration in this case because, though the other grounds were not given up by Mr *Pathak*, who argued the case on behalf of the petitioner he did not advance any arguments before us in respect of those grounds The two grounds for challenging the notices and the proceedings which were urged before the Full Bench were (1) that section 34 (1 A) of the Act was *ultra vires* Article 14 of the Constitution as it denied equality before the law because persons, who could be dealt with under section 34 (1 A) could also be dealt with under section 34 (1) of the Act and (2) that the proceedings, which were being taken by the Income tax Officer were of a judicial or *quasi* judicial nature and the Income tax Officer was a person who had a bias because he or the Central Board of Revenue, under whom he was employed, was interested as a party in these proceedings These are the two points that mainly need consideration by us

In considering the first point, which has been raised before us section 34 which has to be interpreted by us, must be read as it stood in the year 1954 when these seven impugned notices were issued to the petitioner In section 34 (1) the relevant provision is that which relates to clause (*a*) and which, after omitting the parts relevant to clause (*b*), reads as follows

34 (1) If—

> (*a*) the Income tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income tax have escaped assessment for that year, or have been under assessed, or assessed at too low a rate, or have been made the subject of excessive loss, or depreciation allowance has been computed,

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he may in cases falling under clause (a) at any time within eight years serve on the assessee or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub section (2) of section 22, and may proceed to assess or re assess such income, profits or gains or re compute the loss or depreciation allowance and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub section

Provided that—

(i) the Income tax Officer shall not issue a notice under this sub section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be, and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non resident person under section 43, this sub section shall have effect as if for the period of eight years a period of one year was substituted

Explanation—Production before the Income tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income tax Officer will not necessarily amount to disclosure within the meaning of this section

This was the language of section 34 (1) (a), as introduced by the Income Tax and Business Profits Tax (Amendment) Act 1948 In the year 1954, the Income Tax (Amendment) Act, 1954 was passed and it came into force on the 17th of July, 1954 By this Amendment Act, amongst other changes introduced in the Act,

a new sub section (1 A) was introduced in section 34 which reads as follows

(1 A) If in the case of any assessee the Income tax Officer has reason to believe—

(i) that income, profits or gains chargeable to income tax have escaped assessment for any year in respect of which the relevant previous year falls wholly or partly within the period beginning on the 1st day of September 1939, and ending on the 31st day of March, 1946, and

(ii) that the income profits or gains which have so escaped assessment for any such year or years amount, or are likely to amount, to one lakh of rupees or more

he may, notwithstanding that the period of eight years has expired in respect thereof serve on the assessee or if the assessee is a company, on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub section (2) of section 22, and may proceed to assess or re assess the income profits or gains of the assessee for all or any of the years referred to in clause (i), and thereupon the provisions of this Act [excepting those contained in clauses (i) and (ii) of the proviso to sub section (1) and in sub sections (2) and (5) of this section] shall, so far as may be, apply accordingly

Provided that the Income tax Officer shall not issue a notice under this sub section unless he has recorded his reasons for doing so and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice

Provided further that no such notice shall be issued after the 31st day of March, 1956

On the language of these two provisions *Mr R S Pathak*, who very ably argued this case before us, urged that the Legislature had introduced two very important discriminations in the matter of procedure and limitation applicable to cases of persons who may be dealt with under one provision or the other In the case of a

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person dealt with under section 34 (1) (a), a notice could be issued only within eight years of the end of the assessment year to which the notice related and, upon the issue of such a notice, the Income tax Officer, in proceedings to assess or re assess the income, profits or gains, was to be guided, in the matter of procedure by the procedure laid down in section 23 and the following sections of the Act On the other hand in the case of a person on whom notice is issued under section 34 (1) (a), there would be no period of limitation for issue of the notice and the procedure applicable to persons proceeded against under section 34 (1) (a) would not apply, so that such a person would not have the benefit of the procedure given in section 23 and the subsequent sections of the Act and would also not have a right of appeal to the Appellate Assistant Commissioner or the Income tax Appellate Tribunal, nor a right to seek a reference to the High Court It was further urged that persons, whose cases may be covered by section 34 (1 A) of the Act, would also be governed by the provisions of section 34 (1) (a) of the Act, so that two different procedures can be applied at the choice of the income tax authorities to two persons similarly situated

The interpretation by learned counsel for the petitioner that the procedure applicable to proceedings for assessment or re assessment or re computation under section 34 (1) (a) of the Act would be that laid down in section 23 of the Act is undoubtedly correct Under section 34 (1) (a) of the Act, the Income tax Officer is firstly authorized to serve a notice, in the circumstances mentioned therein, on the assessee or the principal officer of the company if the assessee is a company, which notice may contain all or any of the requirements which may be included in a notice under sub section (2) of section 22 and, upon the service of such a notice, the Income tax Officer is authorized to take proceedings for assessment, or re assessment or re computation Then comes the direction that the provisions of the Act shall, so far as may be, apply accordingly as if the notice were a notice issued under sub section (2) of section 22 of the Act" This section thus contains a fiction of law which has

been introduced for the purpose of making the procedure laid down in section 23 of the Act applicable to the proceedings for assessment, re assessment or re computation taken by the Income tax Officer in pursuance of a notice issued under section 134 (1) (a) The fiction of law is introduced by using the words as if the notice were a notice issued under that sub section Clearly, the effect of this fiction of law is that even though a notice under section 134 (1) (a) is different from a notice under sub section (2) of section 22 of the Act the Income tax Officer in taking proceedings for assessment, re assessment or re computation, has to comply with the provisions of the Act which apply when he takes proceedings for assessment in pursuance of a notice under sub section (2) of section 22 of the Act The further submission of learned counsel was that in section 34 (1 A) no such fiction of law has been introduced by the Legislature In this provision of law the circumstances, under which a notice can be issued are slightly different and limited but, when a notice has been served in accordance with that provision of law, the power granted to the Income tax Officer is to proceed to assess or re assess the income profits or gains of the assessee for the years in question Then it is laid down that, thereupon the provisions of the Act, [excepting those contained in clauses (i) and (ii) of the proviso to sub section (1) and in sub sections (2) and (3) of this section], shall, so far as may be apply accordingly In using this language, the Legislature made a departure inasmuch as it did not plainly lay down that a notice issued under section 34 (1 A) is, by fiction of law, equated with a notice under sub section (2) of section 22 of the Act and it was urged that an inference should be drawn from this omission that the provisions of section 23 of the Act would not apply to proceedings for assessment or re assessment under section 34 (1 A) of the Act The further inference, which learned counsel drew was that, since the procedure laid down in section 23 could not be applied the Income tax Officer in proceeding to make the assessment or re assessment would have to discharge his functions as a quasi judicial tribunal in accordance with the principles of natural justice When called upon to explain what

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those principles of natural justice would be learned counsel urged that the principles of natural justice would be the same as have been given statutory form in section 23 of the Act with regard to the making of inquiries and to giving a hearing to an assessee It was however, urged that, since the provisions of section 23 of the Act would not in terms apply, no right of appeal under section 31 would accrue to an assessee against whom proceedings for assessment or reassessment are taken under section 34 (1 A), so that, even though at the initial stage, the Income tax Officer would give a proper hearing to the assessee, the right to go up in appeal to the Appellate Assistant Commissioner by a further appeal to the Income tax Appellate Tribunal or by a reference to the High Court would be denied to him A further result would be that the assessee would not have the same rights of inspection and discovery which would be available to an assessee against whom proceedings are taken under section 34 (1) (*c*) of the Act This interpretation of section 34 (1 A) was sought to be supported by reference to the circumstances in which this provision was introduced by the Legislature in 1954 Just before this provision was introduced, the Supreme Court gave its decision in the case of *Suraj Mall Mohta & Co v A V Visvanatha Sastri* (1) In that decision, the Supreme Court declared the provisions of section 54 of the Taxation on Income (Investigation Commission) Act (XXX of 1947), *ultra vires* Article 14 of the Constitution One of the main considerations for the Supreme Court in declaring that provision of law *ultra vires* was that the procedure applicable to a person proceeded against under that provision of law was materially and substantially different from the procedure applicable to a person similarly situated who could be proceeded against under section 34 of the Income tax Act It was urged that section 34 (1 A) was introduced in the Act for the purpose of taking proceedings against those very persons who could be proceeded against under sections 5 (1) or 5 (4) of the Taxation on Income (Investigation Commission) Act 1947 because section 5 (4) of that Act was declared *ultra vires* by the Supreme Court and it was apprehended that section 5 (1) of that Act would also be

(1) 26 I T R 1.

similarly declared *ultra vires* In order to achieve that purpose the Legislature when introducing section 34(1 A) in the Act did not desire that persons, against whom proceedings are taken under the Act should be able to avail of all the ordinary remedies provided in the Act and wanted that the Income tax Officer should be able to take proceedings for assessment or re assessment of such persons with as much success as the Income tax Investigation Commission could do under Act XXX of 1947 It was thus contended that the fiction of law which had been introduced in section 34(1)(a) was deliberately omitted by the Legislature with the aforesaid object and consequently the provisions of section 34(1 A) of the Act should be interpreted as not including in it the applicability of the procedure for assessment laid down in section 23 of the Act and the consequent application of the provisions contained in sections 31, 33 and 66 of the Act

It appears to me that there are several reasons why such an interpretation should not be accepted The first and the most important reason is that, in my opinion, the language used in sections 23 34(1)(a) and 34(1 A) of the Act by itself leads to the interpretation that, even in respect of proceedings for assessment or re assessment under section 34(1 A) the procedure laid down in section 23 has been made applicable and so also the provisions of sections 31, 33 and 66 of the Act have been made applicable to those proceedings In section 23 of the Act the Legislature has laid down the procedure which the Income tax Officer has to follow in proceedings for assessment of the income, profits and gains of an assessee and for determination of the tax payable by him Under section 34(1)(a), the proceedings which the Income tax Officer is authorized to take after service of notice, are of three different kinds Firstly, he can proceed to assess the income, profits and gains in case the income profits or gains have escaped assessment Secondly he can re assess the income profits or gains in case they have been under assessed Thirdly, he can re compute the loss or depreciation allowance, if excessive loss or depreciation allowance had been computed at

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the time of original assessment under section 23 of the Act If under this provision, the only power which the Legislature granted to the Income tax Officer had been the power to assess the income profits and gains of an assessee which had escaped assessment it seems to me that there would have been no necessity for mentioning the fiction of law that the provisions of the Act would apply as if the notice issued under this provision of law were a notice issued under sub section (2) of section 22 of the Act The Legislature having once laid down the procedure for assessment of income profits or gains need only have laid down in section 34 (1) (a) that the provisions of the Act shall so far as may be, apply accordingly The mere use of this language would have been enough to attract the applicability of the provisions of section 23 to the proceedings for assessment taken under section 34 (1) (a) of the Act Section 34 (1) (a), however, envisages proceedings of two other types viz proceedings for re assessment of income profits or gains and proceedings for re computation of loss or depreciation allowance A proceeding for re computation of loss or depreciation allowance could also be held to be governed by the provisions of section 23 of the Act because computation or re computation would only be an intermediate step in making the assessment Re assessment under section 34 (1) (a) is however different from a proceeding for assessment No doubt in a number of sections of the Act the words assess or assessment have been used so as to include in them re assess" or re assessment , but at least in section 34 (1) (a) of the Act, the word assess cannot be held to include re assess as both the words are used with a disjunctive or between them Consequently so far as section 34 (1) (a) of the Act is concerned, it makes a distinction between a proceeding for assessment and a proceeding for re assessment and for the purpose of this section therefore it became necessary to lay down that the provisions of the Act which apply to a proceeding for assessment would also apply to a proceeding for re assessment This purpose was achieved by the Legislature by introducing the fiction of law that to a proceeding in pursuance of a notice served under section 34 (1) (a) of the Act the provisions of the Act

would apply as if the notice were a notice issued under sub section (2) of section 22 of the Act The introduction of this fiction of law was therefore necessary in order that a proceeding for re assessment under section 34 (1) (a) of the Act may be governed by the procedure laid down in section 23 of the Act with the further result that an assessee whose case is being dealt with under section 34 (1) (a) of the Act should have the benefit of the rights granted under sections 31 33 66 and 37 of the Act

Coming now to section 34 (1 A) of the Act it has first to be kept in view that this section follows sections 22 23 and 34 (1) (a) of the Act These three sections between them on the interpretation placed by me above lay down the procedure which an Income tax Officer has to follow when he either assesses the income, profits or gains of an assessee or re assesses them The procedure for both assessment and re assessment having been laid down in these sections which precede section 34 (1 A) of the Act it became unnecessary for the Legislature to introduce any further fiction of law so that it was sufficient to apply the provisions of the Act It was for this reason that in section 34 (1 A) of the Act the Legislature merely laid down that the provisions of the Act except certain provisions mentioned therein shall apply accordingly Then this clause is preceded by the word thereupon The use of this word indicates that the provisions of the Act would become applicable when, after the issue of a notice under section 34 (1 A) of the Act the Income tax Officer proceeds to assess or re assess the income profits or gains of the assessee In section 34 (1) (a) of the Act the Legislature had, after introducing the fiction of law clearly indicated how the provisions of the Act were to apply even to a proceeding for re assessment though in terms those provisions were applicable only to a proceeding for a sessment and made no mention of a proceeding for re assessment In section 34 (1 A) of the Act the Income tax Officer was again directed after issue of a notice to proceed to assess or re assess the income profits or gains of an assessee and

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when it was laid down that to such a proceeding by the Income tax Officer the provisions of the Act shall apply accordingly it could only mean that the principles laid down in section 34 (1) of the Act would also apply and as a result of the application of those provisions the procedure laid down in section 23 of the Act would be applicable with the necessary consequence that the assessee would be entitled to the benefit of the provisions of sections 31 33 66 and 57 of the Act which right accrues as a result of the applicability of section 23 of the Act No doubt, the omission to introduce the fiction of law in section 34 (1 A) of the Act does not equate a notice issued under it with a notice issued under section 34 (1) (a) of the Act or with a notice issued under section 22 (2) of the Act but there was no necessity of making a provision in this behalf because what the Legislature was concerned with was only the procedure which was to be applied to a proceeding taken by an Income tax Officer under section 34 (1 A) of the Act and not with the nature of the notice issued under it The proceedings being proceedings for assessment or re assessment it was sufficient to say that thereupon the provision of this Act shall so far as may be apply accordingly , as this direction would attract the applicability of all the provisions of the Act which apply to a proceeding for assessment or re assessment Having laid down the procedure for assessment or re assessment in sections 23 and 34 (1) of the Act those provisions were made applicable to proceedings under section 34 (1 A) of the Act by using this expression for which purpose the fiction of law of the type introduced in section 34 (1) of the Act was no longer required This interpretation of the language of these relevant provisions of law thus leads to the conclusion that a proceeding for assessment or reassessment of income profits of gains by an Income tax Officer even under section 34 (1 A) of the Act is governed in the matter of procedure and in the matter of appeals and references to the High Court by the same provisions which govern a proceeding for assessment or re assessment of income, profits or gains under section 34 (1) of the Act There is thus no difference in the matter of

procedure or the rights of an assessee who may be proceeded against either under section 34 (1) (a) or under section 34 (1 A) of the Act

The interpretation sought to be put by learned counsel for the petitioner cannot further be accepted for the reason that on that interpretation section 34 (1 A) of the Act would leave the proceeding incomplete and would not achieve the purpose for which section 34 (1 A) of the Act was introduced If section 23 of the Act is held not to be applicable to a proceeding under section 34 (1 A) of the Act the provisions of the latter section will have to be read by themselves They only empower the Income tax Officer to proceed to assess or re assess the income profits or gains of an assessee, but nowhere lay down that he has also to determine the sum payable as income tax by the assessee on the basis of such assessment or re assessment Under sub sections (3) and (4) of section 23 of the Act the Income tax Officer is not only empowered to assess the total income of an assessee but also the sum payable by him on the basis of such assessment Sub section (5) of section 23 of the Act empowers the Income tax Officer to assess the total income of a firm and then lays down how the tax on the basis of the income of the firm is to be determined and by whom it is to be paid In the case of a registered firm after the income profits or gains of the firm have been assessed, the income tax payable by the firm is not determined and, instead the share in the income, profits or gains of the firm of each partner of the firm is included in his total income and on the basis of the total income of each partner so assessed the sum payable as income tax by each partner is determined In the case of an unregistered firm the Income tax Officer is given the option, instead of determining the sum payable by the firm itself to proceed to assess the total income of each partner of the firm including his share of its income, profits or gains and to determine the tax payable by each partner on the basis of such assessment or, in the alternative, to determine the sum payable by the firm itself The determination of the income tax and the determination of the person by whom the tax is payable is thus laid down in

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section 23 of the Act and is a necessary provision for the purpose for which the Income Tax was enacted viz the charging of incomes to income tax for raising revenues for the Government In case section 34 (1 A) of the Act had been intended by the Legislature to be quite independent of section 23 of the Act similar provisions for determining the sum payable as income tax and the person who was liable to pay that tax would have been included in section 34 (1 A) of the Act also The omission to make provision for determination of the amount of tax and of the identity of the person who is liable to pay that amount can only be explained on the interpretation that the provisions of section 23 of the Act are applicable to a proceeding for assessment or re assessment of income profits or gains of an assessee under section 34 (1 A) of the Act It is also to be noticed that, if the provisions of section 23 of the Act are not applied an anomaly will arise in the case of registered firms It is only under section 23 (5) of the Act that after the income profits or gains of a firm have been assessed, the Income tax Officer is directed not to determine the tax payable by the firm itself but to give effect to the assessment of the income of the firm in the assessment of each partner and to determine the sum payable by each partner after including in his total income his share of the income profits or gains of the firm which may have been assessed A case may arise where the assessee may be a registered firm and initially its assessment may have been made under section 23 (5) of the Act Subsequently it may become necessary to take proceedings for re assessment against the same registered firm under section 34 (1 A) of the Act If the provisions of section 23 (5) of the Act are not applied to the re assessment under section 34 (1 A) of the Act the Income tax Officer would not in such re assessment be entitled to include in the total income of each partner the share of that partner in the income of the firm so re assessed He would be compelled in such a case either to stop at the stage of re assessment of the income, profits or gains of the firm and not determine the sum payable at all or in the alternative he would have to determine the sum payable on the basis of the income of the firm re assessed

by him and declare that that sum will be payable by the firm In the former case the provisions of section 34 (1 A) of the Act would be totally nullified as re assessment of the firm without determination of the tax payable would be nugatory If the latter alternative has to be adopted an anomalous position would arise because at the time of the initial assessment of the in come of the firm there would be no determination of the tax payable by the firm and, on the other hand the effect of that assessment of the firm would have been given in the assessment of each partner by including his share of the firm's income in his total income and by determining the sum payable by him on that basis while at the time of re assessment under section 34 (1 A) of the Act the registration of the firm would have to be ignored and the sum payable would be determined on the income of the firm itself and would be payable by the firm Clearly, no such anomalous position could have been intended by the Legislature If the assessee is a firm and its first assessment is made in one manner under section 23 (5) of the Act then the re assessment under section 34 (1 A) of the Act should also be made in the same manner and the liability to pay the tax should also be determined on identical principles It there fore appears to me that the omission of any provision in section 34 (1 A) of the Act for determination of the sum payable and for deciding who is to pay the sum so determined can be explained only on the basis that the provisions of section 23 of the Act do apply to a pro ceeding under section 34 (1 A) of the Act

The interpretation put by me above is further supported by the exceptions which have been made in section 34 (1 A) of the Act when making the provisions of the Act applicable to a proceeding under it Section 34 (1 A) of the Act lays down that the provisions of the Act excepting those contained in clauses (i) and (iii) of the proviso to sub section (1) and in sub sections (2) and (5) of section 34 shall so far as may be apply accordingly No question could have arisen for making an exception in respect of clauses (i) and (iii) of the proviso to sub section (1) of section 34 of the Act or

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in respect of sub sections (2) and (3) of section 34 unless the whole of section 34 would otherwise have been applicable to a proceeding under section 34 (1 A) of the Act The incorporation of this exception thus leads to the inference that section 34 (1) of the Act has also been made applicable to section 34 (1 A) of the Act and it was for this reason that the Legislature had to make a specific provision barring the applicability of clauses (i) and (iii) of the proviso to the sub section (1) and sub sections (2) and (3) of section 34 of the Act as it was desired that those provisions should not be applicable If section 34 (1) applies the necessary consequence of its applicability is that the proceedings for assessment or re assessment under section 34 (1 A) are to be carried out in the same manner and are to be governed by the same provisions of the Act as proceedings under section 34 (1) of the Act Proceedings under section 34 (1) of the Act are clearly governed by the provisions of sections 25 31 35 and 66 of the Act and, consequently these provisions of the Act have also to be given effect to in proceedings under section 34 (1 A) of the Act

It also appears to me that on the correct principles of interpretation of statutes the interpretation, which I have indicated above will be correct and justified rather than the interpretation sought to be put by learned counsel for the petitioner One well recognized principle is that, though a sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well settled rules of construction whenever the language of the Legislature admits of two constructions the courts act upon the view that the Legislature could not have intended to bring about obvious injustice, so that the courts should accept that possible interpretation which would lead to proper justice In the present case, if I was to accept the interpretation sought to be put on section 34 (1 A) of the Act on behalf of the petitioner it would mean that the Legislature intended to do injustice to persons proceeded against under this provision of law, while it provided justice only in cases of those persons who are proceeded against under section 34 (1) of the Act The interpretation put by me on the

provisions of section 34 (1 A) of the Act would result in equal justice being done between all persons affected by this law and, consequently, that is the interpretation which should be accepted Further a court should also be chary of accepting an interpretation that leads to the invalidity of a law In fact there is presumption in favour of the constitutionality of a legislative enactment as remarked by the Supreme Court in *Ram Prasad Narayan Sahi* v *The State of Bihar* (1) The interpretation, that I have accepted above leads to the constitutionality of section 34 (1 A) of the Act without doing any violence to its language and therefore that interpretation must be held to be the correct one

Learned counsel for the petitioner, in support of his contention that the provisions of section 34 (1 A) of the Act were *ultra vires* Article 14 of the Constitution as it brought about discrimination in the matter of procedure applicable to assessment proceedings and right of appeal and reference to the High Court drew our attention to four cases decided by the Supreme Court These are *Suraj Mall Mohta & Co* v *A V Viswanatha Sastri* (2), *Shree Meenakshi Mills Ltd , Madurai* v *Sri A V Viswanatha Sastri* (3) *A Thangal Kunju Musaliar* v *M Venkatachalam Potti, Authorized Official and Income tax Officer* (4) and *M C T Muthiah v Commissioner of Income tax, Madras* (5) It does not appear to me to be necessary to examine these decisions in detail because the view I have taken is that the procedure for assessment laid down in section 23 of the Act is applicable to assessment or re assessment both under section 34 (1) and section 34 (1 A) of the Act Further I have held that the benefit of the provisions contained in sections 31 33 66 and 37 of the Act are also equally available to persons proceeded against under either section 34 (1) or section 34 (1 A) of the Act Reference may, however, be made to the decision in *Shree Meenakshi Mills Ltd , Madurai* v *Sri A V Viswanatha Sastri* (3), where their Lordships of the Supreme Court considered the validity of sub section

(1) A I R 1953 S C 215
(2) (1954) 26 I T R 1
(3) (1954) 26 I T R 713
(4) 29 I T R 349
(5) 29 I T R 390

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(1) of section 5 of the Taxation on Income (Investigation Commission) Act, 1947, by comparing it with the provisions of section 34(1A) of the Act. Second question, which was canvassed before the Supreme Court in *Shree Meenakshi Mills'* case, (1) was—

> Whether, after the coming into force of the Indian Income Tax (Amendment) Act 1954, which operates on the same field as section 5 (1) of Act XXX of 1947, the provisions of section 5 (1) of Act XXX of 1947, assuming they were based on a rational classification, have not become void and unenforceable, as being discriminatory in character?

The Supreme Court took notice of the fact that the Parliament had, by amending section 34 of the Indian Income Tax Act, provided that cases of those very persons who originally fell within the ambit of section 5 (1) of Act XXX of 1947 and who it was alleged formed a distinct class can be dealt with under the amended section 34 and under the procedure provided in the Income Tax Act. The amendment in section 34 of which the Supreme Court took notice, was the introduction of section 34 (1 A) of the Act. Referring to the persons who could, after the introduction of section 34 (1 A) be dealt with either under section 34 of the Act or under section 5 (1) of Act XXX of 1947 their Lordships remarked

> All these persons can now well ask the question, why are we now being dealt with by the discriminatory and drastic procedure of Act XXX of 1947 when those similarly situated as ourselves can be dealt with by the Income tax Officer under the amended provisions of section 34 of the Act? Even if we once bore a distinctive label, that distinction no longer subsists and the label now borne by us is the same as is borne by persons who can be dealt with under section 34 of the Act as amended, in other words, there is nothing uncommon either in properties or in characteristics between us and those evaders of income tax who are to be discovered by the Income tax Officer under the provisions of

(1) (1954) 26 I. T. R. 713

amended section 34 In our judgment, no satisfactory answer can be returned to this query because the field on which amended section 34 operates now includes the strip of territory which previously was occupied by section 5 (1) of Act XXX of 1947 and two substantially different laws of procedure, one being more prejudicial to the assessee than the other cannot be allowed to operate on the same field in view of the guarantee of Article 14 of the Constitution

In expressing this opinion, their Lordships of the Supreme Court had held that cases of persons proceeded against under section 5 (1) of the Taxation of Income (Investigation Commission) Act, 1947, were not governed by the provisions of the Income Tax Act and had to be decided in accordance with the principles of natural justice They had no right of appeals nor could they claim the benefit of inspection and discovery provided by section 37 of the Act Though their Lordships did not specifically go into the question of the applicability of sections 31 33 and 37 of the Act to cases of persons proceeded against under the amended section 34, the decision of their Lordships proceeded on the basis that persons proceeded against under this amended section 34 did acquire the right of obtaining appellate decisions under sections 31 and 33 of the Act and could also claim the benefit of the substantial and valuable privileges conferred by section 37 of the Act Impliedly, therefore, though not expressly, their Lordships of the Supreme Court held that if proceedings against an assessee are taken under section 34 (1 A) of the Act, that assessee will have the right of going up in appeal to the Appellate Assistant Commissioner and the Income tax Appellate Tribunal and will also have the privileges conferred by section 37 of the Act It was only on the basis of the acceptance of this position that their Lordships came to the view that persons proceeded against under section 5 (1) of the Taxation on Income (Investigation Commission) Act 1947 were being dealt with by a discriminatory and drastic procedure as compared with persons who

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could be dealt with under section 34 of the Act as amended It would thus appear that, in this case, their Lordships of the Supreme Court proceeded on an interpretation of section 34 (1 A) of the Act, which is the same as the interpretation which I have arrived at earlier in this case so that, to a certain extent, the interpretation put by me is supported by the views of the Supreme Court The submission by learned counsel for the petitioner that section 34 (1 A) of the Act is *ultra vires* Article 14 of the Constitution on the ground that it was discriminatory in the matter of procedure, right of appeal and benefit of section 37 of the Act as compared with section 34 (1) of the Act, therefore, fails

The second aspect on which section 34 (1 A) of the Act was challenged as *ultra vires* Article 14 of the Constitution by learned counsel for the petitioner, was that, in the case of a person proceeded against under this provision of law there was no period of limitation prescribed whereas a period of limitation of eight years or four years was laid down in respect of persons against whom proceedings may be taken under section 34 (1) of the Act It was urged that, since the two provisions of law could cover cases of persons similarly situated this discrimination in the matter of limitation rendered section 34 (1 A) of the Act *ultra vires* Article 14 of the Constitution It is to be noticed that, even though there is a common class of assessees who can be proceeded against under both section 34 (1) as well as section 34 (1 A) of the Act the latter provision is applicable to a limited class of persons That class of persons are those whose income profits or gains had escaped assessment for any year in respect of which the relevant previous year fell wholly or partly within the period beginning on the 1st day of September 1939 and ending on the 31st day of March 1946 Then there was a second limitation that the income profits or gains which have so escaped assessment must be believed by the Income tax Officer to be likely to amount to one lakh of rupees or more It seems to me that having picked out such a narrow class, the Legislature made a special provision under section 34 (1 A) of the Act for taking proceedings against that

class of persons without being limited by any period of limitation and by this all that the Legislature did was to enlarge the period of limitation in their cases. Once it has been held that proceedings for assessment under section 34 (1) as well as under section 34 (1 A) of the Act in the matter of procedure, right of appeal, etc. are identical, section 34 (1 A) has to be read as an exception to section 34 (1) of the Act whereby the limitation applicable to the larger class of persons who could be dealt with under section 34 (1) of the Act has been done away with for a smaller class of persons. It is therefore in the nature of an exception specifically for the purpose of enlarging the period of limitation or doing away with the limitation in the case of a limited and narrower class. This narrower class, as indicated by the language of section 34 (1 A) of the Act, consisted of assessees who had earned income during the war period and who had evaded payment of tax on incomes of one lakh of rupees or more, and the purpose of introducing this provision was to subject their escaped income to tax. It is not possible to accept the contention that even such assessees can legitimately claim that they should be allowed to escape payment of tax on ground of limitation like others, who had not made war profits and whose escaped incomes did not amount to one lakh of rupees or more and who may escape after the expiry of the period of limitation of four years or eight years as the case may be. Removal of restriction of limitation in the case of such special class of evaders clearly has a nexus with the purpose for which this provision of law was introduced so that the discrimination brought about by section 34 (1 A) of the Act is not such as to render it void on the ground of violating the provisions of Article 14 of the Constitution. In this connection learned counsel for the petitioner relied on the views expressed by then Lordships of the Supreme Court in the case of *Suraj Mall Mohta & Co. v. A. V. Viswanatha Sastri* (1) where their Lordships pointed out that under the provisions of section 34 of the Income Tax Act investigation into escaped income or evaded income is limited to a maximum period of eight years while under the provisions of sub-section (4) of

(1) (1954) 26 I. T. R. 1

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section 5 of the Act XXX of 1947, it is not limited to any period and this certainly operates to the detriment of those dealt with under sub section (4) of section 5 of the Act XXX of 1947 and those dealt with under section 34 of the Indian Income Tax Act This view was expressed by the Supreme Court after giving a decision that the procedure applicable to persons proceeded against under sub section (4) of section 5 of Act XXX of 1947 was more drastic and discriminatory than the procedure applicable to persons dealt with under section 34 of the Indian Income Tax Act If the procedure was different, the difference in the period of limitation would also be clearly discriminatory but if the procedure had been identical and the persons who could be dealt with under sub section (4) of section 5 of the Act XXX of 1947 had been a narrower class comprised within a bigger class which could be dealt with under section 34 of the Indian Income Tax Act the position might have been different in that case and as in the present case it might have been possible for their Lordships to hold that the provisions of sub section (4) of section 5 of Act XXX of 1947 were in the nature of an exception for a smaller and limited class for which a larger period of limitation for taking proceedings had been provided That not being the case, it must be held that their Lordships of the Supreme Court were dealing with discrimination in the matter of limitation under entirely different circumstances, so that the decision of their Lordships in that case cannot be applied to the present case The principle, on which limitation has been done away with in respect of the class of persons who can be proceeded against under section 34 (1 A) of the Act, is very similar to the principle on which discrimination in the matter of limitation already exists in the Income Tax Act between the classes of persons proceeded against under section 34 (1) (*a*) and section 34 (1) (*b*) of the Act Section 34 (1) (*b*) of the Act deals with cases of persons whose incomes have escaped assessment for any reason whatsoever without any reference to any act committed by those persons Section 34 (1) (*a*) of the Act deals with the cases of persons whose incomes may have escaped assessment as a result of some act or omission on their part,

the nature of that act or omission being indicated in that provision of law Thus the class of persons dealt with under section 34 (1) (*a*) of the Act is also comprised with in the larger class dealt with under section 34 (1) (*b*) of the Act and, in respect of that class the period of limitation for taking proceedings has been enlarged from four years to eight years On the same principle the Legislature considered it advisable that persons belonging to a still narrower class satisfying the requirements of section 34 (1 A) of the Act may be dealt with without any restriction about limitation Such enlargement of limitation for particular classes of persons while keeping the procedure applicable to the proceedings and the rights of such persons the same, is a discrimination which is fully justified by the purpose for which such provisions of law are introduced In these circumstances the contention of learned counsel for the petitioner that section 34 (1) (*a*) of the Act is *ultra vires* Article 14 of the Constitution as being discriminatory in the matter of limitation for proceedings being taken against an assessee also fails and must be rejected

The second ground on which proceedings for re assessment under section 34 (1 A) of the Act have been challenged as mentioned earlier by me, is that proceedings taken by the Income tax Officer were of a judicial or quasi judicial nature and the Income tax Officer was a person who had a bias because he or the Central Board of Revenue under whom he was employed, was interested as a party in the proceedings That proceedings before the Income tax Officer for assessment or re assessment of tax are proceedings of a judicial or quasi judicial nature can now no longer be doubted after the decision of their Lordships of the Supreme Court in *Suraj Mall Mohta and Co*, v *A V Viswanatha Sastri* (1) Their Lordships held that—

> When an assessment on escaped or evaded income is made under the provisions of section 34 of the Indian Income Tax Act, all the provisions for arriving at the assessment provided under section 23 (3) come into operation and the assessment

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has to be made on all relevant materials and on evidence and the assessee ordinarily has the fullest right to inspect the records and all documents and materials that are to be used against him. Under the provisions of section 37 of the Indian Income Tax Act the proceedings before the Income tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at."

In the last sentence, quoted above, their Lordships held that proceedings before the Income tax Officer are judicial proceedings. The reference was to proceedings for assessment on escaped or evaded income under the provisions of section 34 of the Indian Income Tax Act and not as contended by learned counsel for the Department to proceedings under section 37 of the Indian Income Tax Act. Reference to section 37 of the Indian Income Tax Act was made by their Lordships for the purpose of deciding what was the nature of the proceedings before the Income tax Officer when making an assessment on escaped or evaded income under the provisions of section 34 of the Act. Relying on this decision of the Supreme Court learned counsel for the petitioner urged that in the present case, the Income tax Officer who was taking proceedings under section 34 (1 A) of the Act, was dealing with judicial proceedings and, further, that he was a person with a bias inasmuch as he was an officer appointed by the Government to collect revenues and is under the provisions of the Act himself treated as a party when the order of assessment is taken up in appeal to the Appellate Assistant Commissioner or the Income tax Appellate Tribunal. It was urged that, on the principle laid down by the Supreme Court in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation* (1) it was against the principles of natural justice for the Income tax Officer to be entrusted with decisions in judicial proceedings and his decisions are, therefore, invalid. In the case of *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Transport Corporation* (1), their Lordships were dealing

(1) A I R 1959 S C 308.

with decisions under section 68 D (2) given by the State Government on objections filed under section 68 D (1) of the Motor Vehicles Act as amended by the Motor Vehicles (Hyderabad Amendment) Act, 1956, against a scheme published under section 68-C of that Act In section 68 D (2), it was laid down that the State Government may after considering the objections and after giving an opportunity to the objector or his representative and the representatives of the State Transport Undertaking to be heard in the matter, if they so desire approve or modify the scheme Rules were framed by the State Government of Andhra Pradesh laying down the procedure for filing of objection and consideration of the scheme There were also executive orders laying down the manner in which the hearing, required to be given under section 68 D (2) of that Act, was to be given on behalf of the Government The Road Transport Department was in the charge of the Chief Minister and the Home Secretary worked under the Chief Minister and was in charge of the Road Transport Department The Chief Minister ordered that the objections were to be put up before him after the objector had been heard by the Home Secretary and thereupon the Home Secretary heard the objectors and a note of hearing was placed before the Chief Minister for orders The Chief Minister then passed an order approving the scheme It was held by the Supreme Court that hearing given by the Home Secretary was sufficient compliance with the requirements of the law and did amount to a hearing given by the State Government It was, however, held by a majority of Judges constituting the Bench that the hearing given by the Secretary Transport Department who was also the Head of that Department certainly offended the principles of natural justice that in the case of quasi judicial proceedings the authority empowered to decide the dispute between the opposing parties must be one without a bias towards one side or the other in the dispute and that it was a matter of fundamental importance that a person interested in one party or the other should not even formally take part in the proceedings, though in fact he might not influence the mind of the

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person who may finally decide the case On this ground, it was held that the proceedings and hearing given in violation of that principle were bad The proceedings for hearing of the objections were held to be quasi judicial proceedings It was urged by learned counsel for the petitioner before us that, applying the same principle to the instant case, we should hold that the Income tax Officer, who was a person with a bias was not competent to pass orders of assessment or re assessment under section 34 (1 A) of the Act and the proceedings before him were bad as they violated the principles of natural justice, mentioned above Learned counsel for the Department, in reply contended that the Income tax Officer could not be held to be a person having a bias or an interest in the proceedings when he was only carrying out his statutory duties of making an assessment or re assessment in accordance with the provisions of the Act There is, however the fact that when an order is passed by the Income tax Officer and it is taken up in first appeal to the Appellate Assistant Commissioner or in second appeal to the Income tax Appellate Tribunal the Income tax Officer who passed the order for assessment or re assessment, is treated as a party to the appeal In these circumstances the question that the Income tax Officer is a person with a bias or not is not free from doubt but it appears to me that it is not necessary in this case to express any final opinion on this point because, even if it be held that the Income tax Officer is a person with a bias I am not prepared to accept the submission of learned counsel for the petitioner that orders of assessment or re assessment passed by him would be invalid The case of *Gullapalli Nageswara Rao* v *Andhra Pradesh State Road Transport Corporation* (1) which came up before the Supreme Court was one where there was only one right of hearing under the law and, under the rules and orders made by the Government of Andhra Pradesh that hearing was afforded by the Secretary of the Transport Department who was held to be a person with a bias There was no further appeal or any further hearing before any other independent authority or tribunal In the Income

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Tax Act, the position is different Whenever an order of assessment or re assessment is made by an Income tax Officer it is subject to an appeal before the Appellate Assistant Commissioner and to a further appeal before the Income tax Appellate Tribunal There can be a valid scheme where the making of an initial order because of the circumstances in which that order is to be made, may be entrusted to a person who has a bias, but the right of hearing before an independent authority may be granted by making a provision for appeal to an independent authority In such a case, the aggrieved person would get a hearing before an independent authority whose decision would be final and, if such a provision exists it cannot be said that any principles of natural justice are violated It appears to me that the essential feature of the principles of natural justice is that no person should be deprived of any right by a judicial or quasi judicial order unless he has had a hearing before an independent authority who is not interested in the proceeding or in any party to the proceeding Under the Income Tax Act, this principle is complied with by permitting appeals before the Appellate Assistant Commissioner and the Income tax Appellate Tribunal

There is the further aspect that the principle of natural justice which was applied by their Lordships of the Supreme Court in the case of *Gullapalli Nageswara Rao* v *Andhra Pradesh State Transport Corporation* (1) was in that case applied to rules framed by the State Government or to the executive orders passed by the State Government The Legislative enactment had only provided for hearing being given by the State Government without laying down that the hearing was to be by the Secretary, Incharge of the State Transport Department The rules and orders, under which the Secretary of the State Transport Department was authorized to give a hearing were declared void by the Supreme Court on the ground that the procedure violated the principle of natural justice mentioned above

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The same consideration does not apply when the principle of natural justice is done away with by a specific provision having been made in a statute by the Legislature. This was held by their Lordships of the Supreme Court in *A. K. Gopalan* v. *The State of Madras* (1) where their Lordships decision was expressed in the following words:

> There is considerable authority for the statement that the courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to prevade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution, which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights.'

The principle was even more clearly expressed by a Division Bench of this Court in *Ch. Mukhtar Singh* v. *the State of U. P.* (2). In that case, the principles of

(1) A. I. R. 1950 S. C. 27 (2) 1956. A. L. J. 878

natural justice, which held to be well settled were enumerated as being four in number, viz

(1) That every person whose civil rights are affected must have a reasonable notice of the case he has to meet

(2) That he must have reasonable opportunity of being heard in his defence

(3) That the hearing must be by an impartial tribunal i e a person who is neither directly nor indirectly a party to the case, or who has an interest in the litigation or is already biased against the party concerned

(4) That the authority must act in good faith, and not arbitrarily but reasonably

The learned Judges then proceeded to lay down in which cases these principles of natural justice can be invoked under the Indian law and held that they can be invoked in the following three classes of cases

(*a*) When it is alleged that a certain person or class of persons have been unreasonably discriminated against and that the law violates the provisions of Art 14 or that the restrictions imposed upon the freedoms guaranteed under Art 19 are unreasonable

(*b*) When a rule or regulation or order made in the exercise of a statutory power is attacked on the ground that it is unreasonable, and

(*c*) When the procedure adopted by a judicial or quasi judicial authority not being one prescribed by law is challenged on the ground that it is unfair and unjust

Proceeding further, it was held that under the Indian Constitution, except as provided in Art 14 of the Constitution there is no general limitation on the power of the Legislature that it will not enact a law contrary to the principles of natural justice If a certain procedure is prescribed by law then unless it contravenes the provisions of Article 14, it cannot be challenged as invalid upon any supposed principles of natural justice In

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this respect, it departs from the American Constitution under which the Union and the State Legislatures are forbidden to enact laws affecting the life, liberty or property of individuals except in accordance with the due process of law. Due process of law includes principles of natural justice. The doctrine of due process has not been adopted by the Indian Constitution save in certain cases where its principles have been expressly enacted in the Constitution. In the instant case the Income tax Officer has been entrusted with the power of passing orders of assessment or re assessment by the Act itself which was enacted by the Legislature and consequently, principles of natural justice cannot be invoked for the purpose of holding that such a provision is void. It was not urged at any stage before us that in entrusting this work to the Income tax Officer, the Legislature had violated any express provision of the Constitution. This is, in my opinion the principal ground on which this submission made by learned counsel for the petitioner must be rejected.

Out of the remaining points which were raised in this petition, only one other point was mentioned by learned counsel for the petitioner before us. That point is raised in Ground no. (g) of the writ petition and is to the effect that proceedings for assessment or re assessment under section 34 (1 A) of the Act are taken on subjective satisfaction of the Central Board of Revenue or the Income tax Officer without any requirement of disclosure of the grounds of such satisfaction and without any right of prior representation before the satisfaction is recorded. Reliance was placed on a decision of the Supreme Court in *Raghubir Singh v. Court of Wards, Ajmer* (1), I do not think that the decision in that case is applicable to the present case. In that case, certain provisions of the Court of Wards Act were challenged on the ground that there was deprivation of possession of certain property on the subjective satisfaction of the authority mentioned therein. That no doubt violated the principle laid down in Article 19 of the Constitution. In the instant case the subjective

(1) A I R 1953 S C 373

satisfaction is only for the purpose of initiating proceedings under section 34 (1 A) of the Act and all that can be done as a result of that subjective satisfaction is to take proceedings for assessment or re assessment when the assessee is given all the rights which he can claim as a party to a judicial or quasi judicial proceeding It is not possible to accept that the provisions of Article 14 or 19 of the Constitution can apply at the initial stage when proceedings have to be started on the subjective satisfaction of the authority empowered to initiate the proceedings Consequently, this ground has no force at all

The facts and figures in the connected Writ Petition no 469 of 1955 are slightly different from the facts and figures in Writ Petition no 397 of 1955 but it was conceded by learned counsel for the petitioner that the question relating to the invalidity of section 34 (1 A) of the Act and the proceedings taken thereunder which arise in Writ Petition no 469 of 1955 are identical with those which arise in Writ Petition no 397 of 1955 Consequently it is not necessary for me to give the facts and figures relating to Writ Petition no 469 of 1955 and my decision on the basis of facts and circumstances in Writ Petition no 397 of 1955 will fully apply to Writ Petition no 469 of 1955

As a result of my view on the various points that were canvassed before the Full Bench I have come to the conclusion that there is no force in these two writ petitions and they are therefore dismissed with costs which will include Rs 100 in each writ petition as fee of learned counsel for the Department

CHATURVEDI, J —The above petitions were heard by a Division Bench which referred them for disposal by a larger Bench of three Judges I have had the benefit of reading the judgment of Mr Justice V BHARGAVA with whose conclusions I agree The learned Judge has dealt in detail with all the points canvassed before the Full Bench I consequently propose to deal with only the more important ones and to give my own reasons for arriving at the conclusion

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The petitioners in Writ Case no 469 of 1955 are the son and widow of late Sir J P Srivastava and in Writ Case no 397 of 1955 only the son is the petitioner In giving the facts of the case which in all material particulars are the same, I shall refer to the facts of Writ Case no 397 of 1955

The petitioner had been duly assessed to income tax for the assessment years 1940 41 to 1946 47 On or about the 17th May, 1948, he received notices from the Secretary, Incometax Investigation Commission, informing the petitioner that his case had been referred to the Income tax Investigation Commissioner under section 5 (1) of the Taxation on Income (Investigation Commission) Act, 1947 (hereinafter called the Investigation Commission Act) The petitioner was required to furnish to the Investigation Commission certain information and to comply with the requisitions contained in the notice The petitioner supplied some information and also carried out some of the directions as required by the notice Before however the Investigation Commission could deal with the case of the petitioner the Commission was wound up as a result of certain decisions of the Supreme Court of India reference to which will be presently made On the 29th December 1954, the petitioner received seven notices from the Income tax Officer purporting to be under section 34 (1 A) of Indian Income Tax Act By these notices the petitioner was required to submit return of his total income assessable for each of the assessment years 1940 41 to 1946 47 On the 29th January 1955, the petitioner asked for two months time but the Income tax Officer allowed him only one month A request for one month was again made but it was refused by means of a letter dated the 1st March 1955, of the Income tax Officer (respondent no 2) to whom the case had been transferred in the meantime The respondent no 2 allowed time to the petitioner up to the 25th March 1955 for filing the returns The petitioner then wanted the Income tax Officer to supply him with the reasons for the issue of the notices but the reasons were not supplied The petitioner then filed his returns under

protest on the 31st March 1955 The present petition was then moved with the prayer that a writ of mandamus be issued to both the Income tax Officers (respondents nos 1 and 2) directing them to recall the notices and to forbear from proceeding under or in pursuance of the notices

The main ground taken in the writ petition is that section 34 (1 A) of the Indian Income Tax Act is a void piece of legislation inasmuch as it is inconsistent with Article 14 of the Constitution The inconsistency pointed out is that the same class of persons who can be proceeded against under section 34 (1) can also be proceeded against under section 34 (1 A), but the persons proceeded against under section 34 (1 A) are denied equality before the law because they are deprived of the rights of filing appeals and revisions against the assessment order and also deprived of an opportunity of having their cases referred to the High Court under section 66 of the Income Tax Act

If the above were the true position it would be obvious that section 34 (1 A) would be inconsistent with Article 14 of the Constitution but I think that is not really the case In order to appreciate the contentions of *Mr R S Pathak*, learned counsel for the petitioner who has argued the case with ability and skill it is necessary to make a reference to some provisions of the Investigation Commission Act and of the Indian Income Tax Act as also the reasons for the enactment of section 34 (1 A)

The Investigation Commission Act, Act no XXX of 1947 came into force on the 18th April, 1947 Section 3 of the Act authorized the Central Government to constitute a Commission called Income tax Investigation Commission, and section 4 provided for the composition of the Commission Section 5 of the Act as subsequently amended contained four sub sections The first sub section authorized the Central Government to refer to the Commission any case or point in a case in which the Central Government had *prima facie* reasons for believing that a person had, to a substantial extent, evaded

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payment of taxes on income This the Central Government could do at any time before the 1st day of September 1948 Sub section (2) is immaterial and sub section (3) provided that no reference made by the Central Government under sub section (1) could be called in question or be investigated in any manner by any court Sub section (4) authorized the Commission to make a report to the Central Government if by going into a case referred to it under sub section (1) the Commission found reasons to believe that some person other than the person whose case was being investigated had evaded payment of taxes on income or that some additional points in a case referred by the Government required investigation On receipt of such report the Government was to forthwith refer the matter for investigation by the Commission Section 6 contained the powers of the Commission and section 7 the procedure to be followed by it Section 8 authorised the Commission to direct re opening of assessment proceedings and section 9 barred the jurisdiction of all courts to question any act or proceeding of the Commission Section 10 conferred powers on the Central Government to make rules for carrying out the purposes of the Act The Investigation Commission Act was passed under powers possessed by the Indian Legislature at the time when it was passed, and it was then a valid piece of legislation Article 14 of the Constitution came into force with effect from the 26th January, 1950 and the validity of the Investigation Commission Act was challenged more than once after the above date

The first decision of the Supreme Court dealing with the validity of sub section (4) of section 5 is reported in the case of *Suraj Mall Mohta and Co* v *Visvanatha Sastri* (1) Their Lordships held that sub section (4) of section 5 of the Investigation Commission Act included within its scope persons who may have evaded payment of taxes on income irrespective of whether the evaded profits were substantial or unsubstantial It thus included within its ambit all the persons whose cases fell within section 34(1) of the Income Tax Act

(1) (1954) 26 I T R 1

The provisions of the Investigation Commission Act were much more onerous and the result of the discussion led to the conclusion that the same class of persons similarly situate could be dealt with by the onerous provisions of the Investigation Commission Act or section 34 (1) of the Income Tax Act at the will of the Investigation Commission and the Central Government Consequently section 5 (4) of the Investigation Commission Act was held to be inconsistent with Article 14 of the Constitution This decision was given on the 28th May, 1954, and the Central Legislature soon after introduced sub sections (1 A) (1 B) (1 C) and (1 D) in section 34 of the Income Tax Act These sub sections came into force with effect from the 17th July, 1954

In the meantime Sri Meenakshi Mills Ltd had filed petitions in the Supreme Court under Article 32 of the Constitution and, on the above sub sections having been introduced the Mills prayed for and obtained permission to amend the petition by challenging the constitutionality of sub-section (1) of section 5 of the Investigation Commission Act on the additional ground that sub-section (1) of section 5 and the added sub sections in section 34 of the Income Tax Act dealt with the same class of persons, and consequently section 5 (1) of the Investigation Commission Act had become inconsistent with Article 14 of the Constitution Their Lordships decided the writ petition on the 21st October, 1954, and that decision is reported in the case of *Sri Meenakshi Mills Ltd* v *Sri Visvanatha Sastri* (1) The learned Judges held that the procedure prescribed by the Investigation Commission Act was of a summary and drastic nature and constituted departure from the ordinary law of procedure and in important aspects it was detrimental to the persons subjected to it The main points of difference in the normal procedure provided by the Income Tax Act and the Investigation Commission Act had been dealt with in *Suraj Mall Mohta s* (2) case and, therefore did not require further discussion It was held that the persons dealt with under the Investigation Commission Act could complain that they were being

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dealt with under a more drastic and discriminatory procedure, when others similarly situate, could be dealt with by the Income tax Officer under the amended provisions of section 34 of the Income Tax Act This complaint was held to be justified and section 5 (1) of the Investigation Commission Act was also held to be inconsistent with Article 14 of the Constitution

The result of these decisions was that the Central Government could not refer to the Investigation Commission any fresh cases even at the instance of the Investigation Commission But still some cases were pending before the Investigation Commission and in the case of *M C T Muthiah* v *Commissioner of Income tax Madras* (1) it was further laid down that the Investigation Commission had no jurisdiction to complete the investigation of pending cases because the whole procedure adopted by the Commission was violative of the fundamental rights guaranteed to the citizens under Article 14 of the Constitution But the assessments which had become final before the 17th July 1954 were held to be valid and binding This decision led to the winding up of the Investigation Commission finally

A similar Investigation Commission had been set up in Travancore and similar questions of the validity of the Act constituting the Commission were raised and decided by the Supreme Court in the case of *A Thangal Kunju Mudaliar* v *Venkatachalam Potti* (2) The only point to be noted in this decision is that the class of persons falling under section 5 (1) of the Travancore Act, which corresponded to section 5 (1) of the Investigation Commission Act was not the same class of persons as fell within section 47 (1) of the other Travancore Act, which mainly corresponded to section 34 (1) of the Indian Income Tax Act

After narrating the above history of the legislation I may now come to the relevant portion of the impugned sub section, namely section 34 (1-A) of the Indian Income Tax Act This sub section provides that if the Income tax Officer has reasons to believe that income

(1) 29 I T R 390 (2) 29 I T R 349

profits or gains chargeable to income tax have escaped assessment for any year in respect of which the relevant previous year falls within the period beginning on the 1st day of September 1939 and ending on the 31st March 1946 and that such income profits or gains are likely to amount one lakh of rupees or more, the Income tax Officer may notwithstanding that the period of limitation provided in clauses (a) and (b) of sub section (1) of section 34 has expired, serve on the assessee

> a notice containing all or any of the requirements which may be included in a notice under sub section (2) of section 22 and may proceed to assess or re assess the income profits or gains of the assessee for all or any of the years referred to in clause (i), and thereupon the provisions of this Act excepting those contained in clauses (i) and (iii) of the proviso to sub section (1) and in sub sections (2) and (3) of this section shall so far as may be, apply accordingly

The contention of the learned counsel for the petitioner is that a reading of the portion of section 34 (1 A) quoted above, shows that the assessment or re assessment for the years in question is to be made under the above sub section and not under section 23 of the Income Tax Act After such assessment has been made under the impugned sub section the provisions of the Income Tax Act are to apply so far as they are applicable The word thereupon is given the meaning of thereafter and after giving this meaning it is argued that the assessment of income tax is to be under this sub section and not under section 23 with the consequence that the order of assessment passed under sub-section (1 A) would not be appealable under section 30 and not being appealable under section 30 no second appeal would lie to the Appellate Income tax Tribunal under section 33 Further, no reference would be permissible to the High Court under section 66 of the Income Tax Act The argument is that the class of persons covered by section 34 (1) and that covered by section 34 (1 A) is the same and a person who is dealt with under the latter sub section, has all future remedies of appeal, revision and

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reference barred to him which are available to the person dealt with under section 34 (1) of the Income Tax Act All these serious consequences are said to follow from the fact that the assessments which are made under sub-section (1 A) will not be assessments under section 23

I do not find it possible to accept the contention of the learned counsel for the petitioner I think the impugned sub section does not provide for determination of income tax at all In express words it only provides for assessment or re assessment of the income profits or gains Assessment of income is different from the determination or assessment of income tax on the income profits or gains Under the impugned sub section the Income tax Officer is to assess or re assess the income profits or gains and there he has to stop The sub section confers no power upon him to determine the amount of tax For that determination the Income tax Officer will have to go to section 23 of the Income Tax Act Sub section (1) of that section requires the Income tax Officer to first assess the total income of the assessee and then to determine the sum payable by him Determination of tax follows the assessment of income The same is the position with respect to sub section (3) Sub section (4), which provides for what is called best judgment assessment again says that the Income tax Officer—

> shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment

Under sub section (5) the total income of the firm is assessed and in the case of an unregistered firm the income tax payable by the firm itself is to be determined It will thus appear that section 23 makes a clear distinction between assessment of income and determination of tax The impugned sub section (1 A) authorizes the Income tax Officer only to assess or re assess the income profits or gains of the assessee and confers no power on that officer to determine the tax For determination of tax the Income tax Officer will have to go to section 23 It consequently follows that even where proceedings have been started by a notice under sub-section

(1 A) of section 34 and an assessment of the income has been made thereunder the determination of the tax will fall under the provisions of section 23 with the consequence that an appeal, a second appeal and a reference will all be possible

The learned counsel for the petitioner argued that the word assess as used in the Indian Income Tax Act sometimes refers to the assessment of income sometimes to the assessment of income tax and at others to the process of assessment This certainly is correct but in the impugned sub section the word assess does not stand by itself and refers expressly to the assessment of income The learned counsel referred to the dictionary meanings of the words thereupon apply provisions and accordingly The words have been assigned more than one meaning in the dictionaries but none of the meanings assigned to the words exclude the interpretation of the impugned sub section that the Income tax Officer is to assess the income and then the other provisions of the Income Tax Act become immediately applicable including the provisions of section 23

In Ronald Burrows Vol V at page 588 reference has been made to an old English case in which COLERIDGE J said that the word in the relevant provision meant in consequence of the preceding thing being done Shorter Oxford English Dictionary mentions a number of meanings of this word at page 2169 of Vol II and one of the meanings of the word thereupon is on that subject or matter with reference to that In Stroud's Judicial Dictionary the word thereupon has also been assigned the meaning as being equivalent to immediately I think the word thereupon as used in the impugned sub section has the meaning of on that subject or matter But assuming that the word means thereafter the consequence is the same because the impugned sub-section only provides for assessment of income, and on this assessment having been made what immediately has to be done is the determination of the income tax and for that the Income tax Officer will derive his authority from section 23 of the Act

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Coming to the significance of the word apply one of the meanings given to it by the Shorter Oxford English Dictionary is to put into practical operation The other meaning on which *Mr Pathak* relies is to bring it into contact with facts I think the first meaning is the more appropriate one but even the second meaning relied upon by *Mr Pathak* does not alter the position

The word provisions means each of the classes or division of a legal or formal statement or such statement itself, or a class of such statement which makes express stipulation or condition Here again the first meaning has to be applied to the word provisions and this meaning does not in any way help the petitioner

The word accordingly is said to mean harmoniously, properly suitably, correspondingly or in accordance with legal premises In Stroud's Judicial Dictionary it is said to mean agreeably or correspondingly *Mr R S Pathak's* argument is that the word accordingly means correspondingly and that the impugned sub section corresponds to section 23 in the matter of determination of tax I find myself unable to accept his argument The word accordingly here means suitably, properly or harmoniously

All the four words concerning the meaning of which controversy was raised before us are capable of bearing the meanings which are consistent with the intention of the Legislature In holding that the impugned sub section contains the power of determination of tax in itself and that determination of tax does not fall under section 23, I think the court will have to stretch the meaning of the words in favour of the petitioner in order to invalidate the legislation The rule of construction, on the other hand, is that there is a strong presumption that a statute is in accordance with the Constitution and that in cases of ambiguity meaning should be attached to it which would make it constitutional I think there is no real ambiguity in the wordings of the impugned sub-section and the wordings clearly point to the conclusion that the determination of tax is not to be done

under that sub-section, and to this matter as well as others the provisions of the Indian Income tax Act are to apply in so far as they may suitably be applied In order to determine the tax the Income tax Officer will have to go to section 23 and the determination of the tax therefore will be under that section Orders determining taxes under section 23 are appealable under section 30 and a second appeal lies under section 33

The circumstances, which led to the introduction of the impugned sub section in section 54 of the Indian Income Tax Act necessarily point to the conclusion that the Legislature must have tried to remove the defects for which section 5 (1) of the Investigation Commission Act had been held to be inconsistent with Article 14 of the Constitution by the highest Court in the country The main reason for invalidating section 5 (1) was that the order determining tax in pursuance of section 5 (1) was final and not open to a first appeal second appeal or a reference to the High Court The impugned sub section was enacted after the above decision and it is not possible to contemplate that the Legislature would in spite of the previous decision of the Supreme Court again incorporate the main objections in the subsequent legislation The intention of the Legislature must necessarily be to remove the defects which had invalidated section 5 (1) of the Investigation Commission Act This intention, I think can be clearly gathered from the language of the impugned sub section

Mr Pathak, referred to the cases of *Smt Hira Devi* v *District Board, Shahjahanpur* (1) and *Nalmakya Bysack* v *Shiam Sunder Haldar* (2) In the first case it was laid down that it was the duty of the court to try and harmonise the various provisions of an Act passed by the Legislature but that it was certainly not its duty to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of the Act In the second case it was held that if there was some defect in the phraseology used by the Legislature, the court could

(1) A I R 1922 S C 362 (2) A I R 1953 S C 148

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not avoid the Legislature's defective phrasing of an Act or add or amend or by construction make up deficiencies which were left in the Act. From what I have stated above I think I am not doing anything in interpreting the impugned sub section which has been prohibited in the cases cited above.

On the other hand the cases of *Bengal Immunity Co. Ltd.* v. *State of Bihar* (1) and *Goberdhan Das Purshotam Dass* v. *Eastern Cotton Company* (2) are authorities for the proposition that there is a presumption of the constitutionality of an enactment. In the book *Interpretation of Statutes* by Maxwell there are passages at pages 236, 256, 526 and 352 of the 9th edition, conferring wide powers on the court in the matter of interpretation of statutes. But in interpreting the present statute it does not appear to be necessary to call in aid any of those powers.

In conclusion it may be stated that section 34 (1) of the Income Tax Act is to be applied generally to persons whose income has escaped assessment and sub section (1 A) is to apply to the particular class of tax evaders who had made profits exceeding a lac of rupees during the war period. This is a definite class of persons against whom no proceedings could be taken under section 34 (1) on the date the impugned section came into force namely the 17th July 1954. The period provided for cases falling under section 34 (1) (*a*) was 8 years and 7 years had expired before the impugned sub section came into operation. The profits of only one year could be assessed both under section 34 (1) and section 34 (1 A). But it is obvious that where escaped income of the whole or major portion of the war period was to be investigated recourse would be had to the impugned section which on its history and wordings was meant to cover cases of the evasion of taxes during the war period. Even for that one year, concerning which notices could have been issued under both the sub sections the Income tax Officer could proceed only under sub section (1 A) if he was proceeding to assess the income for any substan

(1) (1955) 2 S. C. R. 603 (2) A. I. R. 1958 S. C. 713

tial portion of the war period There is thus a classification which was a reasonable one and clearly related to the object of the legislation

Further, assuming that one business man was proceeded against under section 34 (1 A) and another similarly situate, was proceeded against under section 34 (1) it would really make no difference because all the material provisions of the Indian Income Tax Act would apply to both the persons The provisions of the impugned sub section are in no way more stringent or harsh than the provisions of section 34 (1) No question of discrimination thus arises at all

I may now briefly refer to the second point urged by the learned counsel for the petitioner though he did so with some hesitation The point is that the Income tax Officers are persons with a bias against the assessees and they have thus no jurisdiction to assess income or to determine tax thereon In support of the point the learned counsel referred only to a recent decision of the Supreme Court reported in the case of *Gullapalli Nageswara Rao v Andhra Pradesh State Roadways Transport Corporation* (1) The above case arose out of proceedings taken under the Indian Motor Vehicles Act There was also a local Act known as Andhra Pradesh Road Transport Corporations Act The Act provid d for the procedure for approval of a scheme for running the State Transport service The State Transport undertaking was authorized to prepare a scheme providing for Road Transport service to the exclusion complete or partial of other persons Any persons affected by the scheme could file objections before the Secretary to Government in charge of Transport Department The Government then fixed a date for hearing objections and then the objections were to be considered and the scheme modified or approved The objections in this case were filed and they were considered by the Secretary to Government in charge of the Transport Department He submitted a report to the Minister in charge and the Minister th n approved the scheme The learned Judges held by a majority that

(1) A I R 1959 S C 308

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the proceedings were of a quasi judicial nature and the Secretary to Government had acted as a judge in his own case His decision was therefore void I think that the facts of the Supreme Court case are clearly different from the facts of the case before us There was a Road Transport Corporation in the State of Andhra Pradesh and the Secretary of the Transport Department was in charge of it It was open to him to decide objections of the persons who were affected by the scheme prepared by the Corporation The objectors formed one party and the Road Transport Corporation the other The Secretary in charge of the Department was also presumably responsible for the working of the Road Transport Corporation Under the circumstances, he was also an interested person The position in the cases before us is very different It cannot be said that the Income tax Officers are one party to the assessment and the assessee the other On the other hand the parties are the Central Government and the assessee The Income tax Officer is to perform quasi judicial acts and make enquiries concerning the correct income that the assessee made during the year in question He is expected to act impartially between the Central Government and the assessee and then arrive at a decision as regards the assessable income It is not in his interest personally or in his official capacity to improperly assess people to tax even though the tax is not due He has neither to over assess the people nor under assess them He is not expected to make assessments not authorized by the statute

The suggestion of the learned counsel for the petitioner is that every Income tax officer likes to show recoveries by way of income tax in order to show efficiency in his work He is thus personally interested against the assessee I do not think any such presumption is permissible The Income tax Officers are expected to perform their duties without fear or favour and to recover taxes only where they are legally due The result of accepting the contention of the learned counsel would be that the work of the Income tax Officer would

have to be done by officers belonging to the other departments and when those officers have been deputed to this work it might again be argued that those officers had acquired a similar interest I do not think that the decision relied upon by the learned counsel has any application to the facts of these cases

For the reasons given above I would dismiss the writ petitions with costs which will include Rs 400 in each writ petition as fee of learned counsel for the department

UPADHYA, J —These two petitions under Article 226 of the Constitution raise the question as to whether section 34 (1 A) of the Indian Income Tax Act is void as offending against Article 14 of the Constitution

The petitioners pray for the issue of appropriate writs to quash the notices issued under that section Though several grounds were raised in the petition learned counsel for the petitioners without giving up the other grounds pressed in the main for our consideration two grounds for challenging the notices and proceedings under section 34 (1 A) of the Income Tax Act—(1) That section 34 (1 A) of the Act offended Article 14 of the Constitution as it denied equality before the law and provided a discriminatory procedure which could be followed by the Income tax Officer in the case of persons selected by him for such treatment and (2) that the proceedings being of a judicial or quasi judicial nature, the Income tax Officer who was an interested party could not be validly empowered to take action and decide such cases

I have had the advantage of reading the opinions expressed by my learned brothers, BHARGAVA and CHATURVEDI JJ Though I agree with their decisions relating to the second ground mentioned above I regret I am unable to agree with their views on the first ground

The facts of the case have been set out by my brother BHARGAVA, J, and I do not think it is necessary to repeat them He has also set out in his judgment the development of the law relating to the provisions of section 34 of the Income Tax Act which again need not be reiterated

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Section 34 (1) provides for the assessment of income profits and gains chargeable to income tax that have escaped assessment over any year or have been under assessed or assessed at too low a rate or have been made the subject of excessive relief under the Act or excessive loss or depreciation or allowance has been computed and dividing such cases into two classes on certain grounds enumerated in that section, prescribes certain periods of limitation during which notices may be issued by the Income tax Officer to the person concerned and further lays down that a notice to be issued should be one containing all or any of the requirements which may be in a notice under sub-section (2) of section 22 and that the Income tax Officer may proceed to assess or re assess income profits or gains or re compute the loss or depreciation allowance and the provisions of the Act shall so far as may be apply accordingly as if the notice were a notice issued under that sub section [viz, section 22 (2) of the Act]

Section 34 (1 A) which was introduced by the Indian Income Tax (Amendment) Act, 1954 with effect from the 17 July, 1954, provides as follows

> 34 (1 A) If in the case of any assessee the Income tax Officer has reason to believe—
>
> (i) that income profits or gains chargeable to income tax have escaped assessment for any year in respect of which the relevant previous year falls wholly or partly within the period beginning on the 1st day of September, 1939, and ending on the 31st day of March 1946, and
>
> (ii) that the income profits or gains which have so escaped assessment for any such year or years amount or are likely to amount to one lakh of rupees or more,
>
> he may notwithstanding that the period of eight years or as the case may be, four years specified in sub section (1) has expired in respect thereof serve on the assessee, or if the assessee is a company, on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub section (2) of

section 22 and may proceed to assess or re assess the income profits or gains of the assessee for all or any of the years referred to in clause (i) and thereupon the provisions of this Act [excepting those contained in clauses (i) and (iii) of the proviso to sub section (1) and in sub sections (2) and (3) of this section] shall so far as may be apply accordingly

Provided that the Income tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice

Provided further that no such notice shall be issued after the 31st day of March, 1956

In order to proceed under this provision of the Statute the Income tax Officer should have reason to believe (i) that income profits or gains chargeable to income tax that have escaped assessment were partly or wholly of the periods falling between the 1st September 1939, and the 31st March 1946 and (ii) that they amounted to one lakh of rupees or more If the officer has reason to believe these two things the period of eight years and four years mentioned in section 34 (1) are not to be applicable and the Income tax Officer may issue a notice containing all or any of the requirements of a notice under section 22 (2) and the provisions of this Act excepting those contained in clauses 1 and 3 of the proviso to sub section (1) and in sub sections (2) and (3) of this section shall so far as may be apply accordingly The words as if the notice were a notice issued under that sub section , which occur in section 34 (1), do not find place in this new provision *Mr Pathak*, learned counsel for the petitioner, contended that this omission was significant, meaningful and of consequence The procedure to be adopted in cases falling under section 34 (1 A) is not intended to be the same as the procedure which has to be followed in those falling under section 34 (1) Learned counsel contended that inasmuch as both these sections related to the assessment of income profits and gains chargeable to income tax that have

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escaped assessment for any year, the legislature has gone contrary to Article 14 of the Constitution in providing a different procedure which according to him was more drastic in the cases falling under section 34 (1 A) This contention has not found favour with my esteemed brothers

The Income Tax Act lays down the procedure to be followed for the levy and collection of tax The provisions relating to this procedure begin with section 21 of the Act, which lays down how the prescribed person in the case of every government office and the principal officer or the prescribed officer in the case of every local authority company or other public body or association and every private employer shall prepare within 30 days of the commencement of the financial year and deliver to the Income tax Officer in the prescribed form a return in writing giving certain information prescribed in that section Sections 22 and 23 are most important sections in the Act which deal with procedure Section 22 (1) says how an Income tax Officer is to publish a notice calling for returns of income and how all persons having taxable income are required to submit returns in the prescribed form of their total income etc Section 22 (2) says that if the Income tax Officer is of opinion that any person has income of such an amount as renders him liable to income tax, the officer may serve a notice upon him requiring him to furnish within a certain period a return in the prescribed form setting forth his total income during the previous year Section 22 (3) enables the assessee to file a return even after the period allowed to him under section 22 (2) has expired at any time before the assessment Section 22 (4) empowers the Income tax Officer to call for the production of certain accounts, etc Section 22 (5) provides how certain information mentioned in that section has to be given in the returns to be filed under sub sections (1) and (2) After calling for the return, the Income tax Officer has to proceed to make the assessment In case a return is filed it is open to him to accept it as correct and complete and make an assessment under section 23 (1) If the Income tax Officer is not satisfied with the return, he may give the

assessee an opportunity to produce evidence in support of his return under section 23 (2) The next sub section 23 (3) lays down how the Income tax Officer after receiving the evidence tendered under section 23 (2) and taking such evidence as he himself may find necessary to require on specified points shall by an order in writing assess the total income of the assessee and determine the sum payable by him on the basis of such assessment The next sub section empowers the Income tax Officer to make an assessment to the best of his judgment in certain cases and also to refuse to register firms or to cancel their registration in the event of defaults by the firms Sub section (5) deals with the incidence of taxation in the case of firms Section 23 (3) enables the Income tax Officer as mentioned above to make the assessment on the day specified in the notice issued under sub section (2) of section 23 or as soon thereafter as may be This section, therefore requires that a notice under section 23 (2) must precede an assessment under this sub section Section 23 (2) requires an Income tax Officer to issue a notice in case he is not satisfied with the return filed by an assessee under section 22 The provisions of section 23 (2) are, therefore applicable only to those cases where returns have been made either voluntarily under section 22 (1) or in response to a notice under section 22 (2) The words used in this sub section are material and may be quoted

> 23 (2) If the Income tax Officer is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 22 is correct and complete he shall serve on such person a notice requiring him, on a date to be therein specified either to attend at the Income tax Officer s office or to produce or to cause to be there produced any evidence on which such person may rely in support of the return

The significance of the fiction introduced in section 34 (1) that the notice issued under that provision should be deemed to be a notice issued under section 22 (2) is realized when we find occurring in section 23 (2) and certain other provisions of the Act definite reference to the notice issued under section 22 (2) It may be noticed

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that section 23 (2) contains no reference whatever to any notice issued under section 34 (1) In the absence of the above fiction introduced by the use of express words in section 34 (1) that the notice to be issued under that section was to be deemed to be a notice under section 22 (2) section 23 (2) would not be applicable at all The Income tax Officer is bound to give an opportunity to the assessee to produce evidence in support of his return only if the return is filed under section 22 By reason of the fiction mentioned above the notice issued under section 34 (1) is to be deemed to be a notice under section 22 (2) and therefore the Income tax Officer before making an assessment has to issue notice under section 23 (2) of the Act asking the assessee to prove his return After this opportunity has been given and a date fixed for the purpose the Income tax Officer may proceed to make an assessment under section 23 (3) in the case of a notice issued under section 34 (1) as in the case of a notice issued under section 22 (2) itself Section 34 (1) lays down that the provisions of this Act shall so far as may be apply accordingly as if the notices were a notice issued under that sub section This makes section 23 applicable to cases under section 34 (1) also for all the provisions of this Act are to apply as if the notice issued under section 34 (1) were a notice issued under section 22 (2) Section 23 of the Act therefore which is a provision relating to assessment is to apply to a case under section 34 (1) and it is only then that an appeal may be preferred against the assessment under section 30 to the Appellate Assistant Commissioner Section 30 has no reference to an assessment under section 34 (1) and among the persons who may prefer an appeal under section 30 is an assessee objecting to the amount of income assessed under section 23 This right has not been specifically conferred on any person assessed under any provision other than section 23 of the Act The second appeal to the Appellate Tribunal can only be preferred by an assessee who has first preferred an appeal to the Appellate Assistant Commissioner so that a person who has not been served with a notice under section 22 (2) or with a notice which may be treated as one under section 23 (2) by a fiction of the law cannot be assessed under section

23 cannot prefer an appeal to the Appellate Assistant Commissioner and cannot go up in a second appeal to the Tribunal The question of coming to the High Court or going up to the Supreme Court under the provisions of the Act does not arise I am inclined to accept Mr *Pathak's* argument that use of the words as if the notice were a notice issued under that sub section [under section 34 (1)] was intentional and calculated to introduce a fiction which was considered to be essential to make available a procedure prescribed in the Act for cases where a notice had been issued under section 22 (2) and make certain other provisions available for application which in the Act contain specific reference to section 22 Some of such provisions may be mentioned Section 25 A deals with cases where a partition has taken place in a joint Hindu family and provides how the tax may be apportioned between erstwhile members of the family Where at the time of making an assessment under section 23 it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family The assessment has to be under section 25 beginning with a notice under section 22 in order to enable an assessee to claim the advantage of this provision of the statute Similarly section 26 (1) which deals with what is to happen when a change takes place in the constitution of a firm says— Where at the time of making an assessment under section 23 it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted the assessment shall be made on the firm as constituted at the time of making the assessment ' There is no reference to a change that may be found at the time of making an assessment under section 34 I do not think it can be urged that this omission to refer to section 34 is unintentional or without any significance In section 24 B sub section (2) which deals with the procedure in case a person dies before he is assessed there is specific reference both to section 22 as well as to section 34 This provision is as follows

> 24 B (2) Where a person dies before the publication of the notice referred to in sub section (1) of

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section 22 or before he is served with a notice under sub section (2) of section 22 or section 34 as the case may be his executor, administrator or other legal representative shall on the serving of the notice under sub section (2) of the section 22 or under section 34 as the case may be, comply therewith and the Income tax Officer may proceed to assess the total income of the deceased person as if such executor administrator or other legal representative were the assessee

Section 27 has no reference to section 34 and deals with cases where defaults have been committed in respect of a notice under section 22 (1) or (2) or (4) or section 23 (2) of the Act When we come to section 28 we again find a reference to section 34 That section says

28 (1) If the Income tax Officer the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub section (1) or sub section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice

Provided that—

(a)

(b) Where a person has failed to comply with a notice under sub section (2) of section 22 or section 34 and proves that he has no income liable to tax the penalty imposable under this sub section shall be a penalty not exceeding twenty five rupees

As mentioned above, section 30 has no reference to section 34 as such and it is only when a person has been assessed under section 23 that he can go up in appeal to an Appellate Assistant Commissioner In the absence of the fiction requiring the notice under section 34 to be treated as one under section 22 (2), the assessment cannot be treated as one having been made under section 23 and no

appeal would, therefore lie to the Appellate Assistant Commissioner The powers of the Commissioner under section 33 A are however not restricted to proceedings under section 23 and he is competent to call for the record of any proceeding under this Act and make such enquiry or pass such orders thereon as he thinks fit This is obviously comprehensive enough to empower a Commissioner to send for the record of proceedings under section 34 even if the fiction relating to the notice be not there and to pass such orders there on as he considers proper Under section 33 B (2) (a) the Commissioner is not competent to pass an order under sub section (1) of section 33 B to revise an order of re assessment made under the pro visions of section 34 This mention of section 34 indi cates that assessments under sections 23 and 34 were both distinctly in view when these provisions were enacted It appears therefore from the above that it is not possi ble to treat a notice issued under section 34 (1 A) exactly at par with a notice issued under section 34 (1) of the Act The expression as if the notice were a notice issued under that sub section does not find place to the new section 34 (1 A) The question is whether the omis sion results in any difference between the two notices and the procedure to be followed on the issue of those two notices It has been contended that the expression thereupon the provisions of this Act shall, so far as may be apply accordingly is comprehensive enough to make all the other provisions of this Act applicable except those mentioned in clauses (i) and (iii) of proviso to sub section (1) of section 34 and to sub sections (2) and (3) of section 34 In the first place it does not appear correct to take the view that in spite of a difference in language the meaning of the two provisions must be taken to be the same A fiction is intended to be intro duced in section 34 (1) so that a notice issued under sec tion 34 (1) may be treated as if it were issued under section 22 (2) Had it been intended that a similar fiction should attach to a notice issued under section 34 (1 A), there appears to be nothing why the Legislature should have dropped the relevant phrase when enacting

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section 34 (1 A) Those provisions of the Act whose application has been expressly excepted may be considered Clause (iii) of the proviso to sub section (1) of section 34 provides that the Income tax Officer shall not issue a notice under clause (a) of section 34 (1) unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such a notice The proviso to section 34 (1 A) requires the Income tax Officer not to issue a notice unless he has recorded his reasons for doing so and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notices When the new provision requires the Central Board of Revenue to be satisfied it was obviously necessary to make it clear that the satisfaction of the Commissioner was not relevant Clause (ii) of the proviso to section 34 (1) relates to the periods of eight years and four years mentioned in section 34 (1) and, as these periods are not mentioned in section 34 (1 A), this clause was also evidently inapplicable Section 34 (2) relates expressly to assessments re opened in the circumstances falling under clause 34 (1) (b) This provision therefore could not apply to section 34 (1 A) Section 34 (3) deals expressly with cases of assessment under section 23 and says that no such assessment shall be made after the expiry of eight years or four years from the end of the relevant assessment year as provided in that section This again is evidently inapplicable to section 34 (1 A), which empowers an assessment to be made without any period of limitation being prescribed for such assessment These exceptions furnish no clue as to how the other provisions of the Act would apply Section 34 (1 A) says that the provisions of this Act shall so far as may be apply accordingly If we examine section 23 and try to apply the provisions of that section to proceedings started by a notice issued under section 34 (1 A) we find that unless the various provisions of section 23 are modified they cannot be made applicable to section 34 (1 A) Section 23 (1) says

> 23 (1) If the Income tax Officer is satisfied without requiring the presence of the assessee or the

> production by him of any evidence that a return made under section 22 is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return

This evidently relates to a return made under section 22 A return made in response to a notice under section 34 (1 A) is certainly not a return under section 22 and this provision of the statute as it stands is inapplicable Similarly section 23 (2) requires an Income tax Officer who is not satisfied with the return made under section 22 to give an opportunity to an assessee to produce evidence in support of that return Again if the return filed under section 34 (1 A) cannot be treated as a return under section 22 this provision cannot be applied Section 23 (3) refers to subsequent proceedings and section 23 (4) again deals with persons in default of notice issued under sections 22 and 23 These provisions therefore do not as such apply to proceedings under section 34 (1 A) It is contended that the procedure prescribed under these provisions is based on principles of natural justice and should be followed in cases where the notice has been issued under section 34 (1 A) It may be that when making an assessment under section 34 (1 A) the procedure consistent with the principles of natural justice may have to be followed but this is not the same thing as applying the provisions of the Income Tax Act to such proceedings The section says that the provisions of the Income Tax Act shall apply so far as may be This in my opinion means so far as they may be applied I am unable to read in this provision a direction that the provisions of the Income Tax Act should be applied *mutatis mutandis* with such changes as may be necessary to make them applicable to proceedings under section 34 (1 A) It appears to me that the provisions of the Income Tax Act should apply to proceedings under section 34 (1 A) only so far as they can be applied without any change in the language of those provisions and when there is no conflict between those provisions and section 34 (1 A) If the language used in section 23 is such that it applies in terms only to cases

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where a return is filed in response to a notice under section 22 I find myself unable to accept the contention that the section should also be made applicable to a return filed in response to a notice issued under section 34 (1 A) I find that there is no warrant for reading section 34 (1 A) for section 22 wherever the latter section is mentioned in section 23 The whole of the section should be applied if possible and if we apply the entire section 23, reference to returns under section 22 will be there and the provisions of section 23 relating to assessments to be made after returns have been filed under section 22 will also be there and it will not in any way improve the situation and I do not see how an assessment made under section 34 (1 A) may be treated as an assessment made under section 23 It is to remove this difficulty that the fiction was introduced in section 34 (1) Section 34 (1 A) does not say that the other provisions of the Act will apply with such modification as may be necessary In this connection it may be worth recalling section 21 of the Excess Profits Act That section reads as follows

> The provisions of sections 4 A, 4 B 10 13 24 B, 29 36 to 44 C (inclusive) 45 to 48 (inclusive) 49 E 49 F 50, 54, 61 to 63 (inclusive), 65 to 67 A (inclusive) of the Indian Income Tax Act 1922 shall apply with such modifications if any as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income tax and every officer exercising powers under the said provisions in regard to income tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub section (3) of section 3 as he exercises in relation to income tax under the said Act

The provisions of the Income Tax Act mentioned in section 21 of the Excess Profits Tax Act were made to apply *with such modification*, if any as may be prescribed There is no such provision in section 34 (1 A) enabling one to apply the other provisions of the Income Tax Act with such modification as may be necessary The law only says that the other provisions of the Act may

be applied so far as may be only and if they cannot be applied as they stand, they cannot be applied at all

It was argued that among the provisions of the Act made applicable to section 34 (1 A) is section 34 (1) itself along with its fiction and the fiction would thus be available even if the notice be issued under section 34 (1 A) The fiction is restricted to a notice issued under section 34 (1) and even if it be assumed that section 34 (1) would apply the fiction cannot be torn away from its context and be made applicable to a notice issued under section 34 (1 A) Besides sections 34 (1) and 34 (1 A) are parallel provisions and I am unable to see how the main part of section 34 (1) can be applied at all to section 34 (1 A) The three provisos and the explanation to section 34 (1) deal with matters which may be said to be relevant to the main provision Of these provisos (i) and (iii) were found to be obviously inapplicable and have been excepted For the same reason the main provisions of section 34 (1) which deal with cases where notices are to be issued under section 34 (1 A) and 34 (1 B) would not apply to a notice issued under section 34 (1 A) It may be noticed, however, that the second proviso which says that the tax shall be chargeable at the rate at which it would have been charged had the income, profit and gains not escaped assessment or full assessment as the case may be is not excepted for the proviso can obviously be applied to a case of an assessment made under section 34 (1 A) Similarly the explanation also may be found to be applicable to section 34 (1 A)

An argument has been advanced that if the provisions of sections 23 30 31 33 and 66 are not made applicable the entire object of the Legislature to assess income of the class mentioned in section 34 (1 A) would be frustrated and the Legislature cannot be credited with having put on the Statute Book a piece of legislation which was abortive or ineffectual Section 34 (1 A) empowers the Income tax Officer not only to issue a notice as mentioned in that section but goes on to say that he may proceed to assess or re assess the income profits or gains of the assessee for all or any of the years referred It is contended that this empowers an Income tax Officer to

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assess the income but does not empower him to levy the tax. Our attention was invited to section 23 (3) which says that the Income tax Officer shall by an order in writing assess the total income of the assessee and determine the sum payable by him on the basis of such assessment. It is contended that the determination of the sum payable by the assessee on the basis of an assessment is essential to impose a liability on the assessee.

Section 3 of the Income Tax Act is the charging section. It reads as follows:

> 3. Where any Central Act enacts that income tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of the total income of the previous year for every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.

This section lays down that tax shall be charged in respect of the total income of the previous year of an assessee. The determination of the total income, therefore is a very important thing to be done under the Act. Section 4 which deals with the application of the Act to various kinds of income says how the total income is to be ascertained and total income has been defined in section 2 (15) as meaning the total amount of income, profits and gains computed in the manner laid down in the Act. The determination of the tax payable on the total income is in fact levying a charge of tax which section 3 requires to be done. The words assess and assessment have not been defined in the Act but assessee was defined originally as a person by whom the tax was payable and the assessee now under section 2 (2) means a person by whom income tax or any other sum of money is payable under this Act and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund

due to him Lord SIMON in his Book on Income tax, Volume I at page 160, (Second Edition) says—

> For income tax purposes assessing means the process of making assessments and covers the process from the examination of the completed return forms if any to the issue of the notices of assessment showing the amounts of tax payable

In this country the word assessment as used in the Indian Income Tax Act has been held to have a very comprehensive meaning varying with the context In *Commissioner of Income tax Bombay and Aden* v *Khemchand Ramdas* (1) Lord ROMER observed as follows

> One of the peculiarities of most Income Tax Acts is that the word assessment is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in this Act for imposing liability upon the tax payer The Indian income tax is no exception in this respect

In *Seth Badri Das Daga* v *Commissioner of Income tax* (2) Lord REID said

> Some confusion arises from the fact that in the Act the words assessment and assessee are used in different places with different meanings

The same view was taken by a Bench of the Bombay High Court in *Commissioner of Income tax* v *Jagdish Prasad Ramnath* (3), CHAGLA, C J, observed

> Now it is perfectly true that the expression assessment has been very widely construed and it has been observed that it bears a different meaning according to the context in which it is used, and we accept Mr Kolah s contention that in section 30 we must construe the expression assessed in its widest connotation Therefore assessment may not only be the computation of the income it may not only be the determination of the amount of tax payable but it may refer to the whole procedure laid down in the Act for imposing liability upon the tax payer

(1) 1938 I T R 414 (2) 17 I T R 209
(3) (1955) 27 I T R 192

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The learned CHIEF JUSTICE followed the dictum of the Privy Council in *Khem Chand Ramdas's case* (1). The House of Lords had occasion to consider what assessment means under the English Act. The *Income tax Commissioner* v. *Gibbs* (2) the Lord CHANCELLOR, (Viscount Simon), observed at page 124:

> The word assessment is used in our Income Tax Code in more than one sense. Sometimes by assessment is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax upon it. But in another context the assessment may mean the actual sum in tax which the taxpayer is liable to pay on his profits.

The above observations by eminent Judges relating to the meaning of the word assessment do appear to support the view that the words may proceed to assess or re-assess the income in section 34 (1 A) means not only to compute or re-compute the income but also to levy the tax chargeable on such income. Once this meaning is accepted it cannot be said that section 34 (1 A) would be infructuous or abortive or that the Income tax Officer would have to stay his hands after determining the total income of the person to be assessed as section 23 being inapplicable he may not determine the tax payable. The whole object of assessing the total income is to levy the tax. Section 3 says tax shall be charged on the total income. Section 29 says that when any tax is due in consequence of any order passed under or in pursuance of the Act the Income tax Officer shall serve upon the assessee or other person liable to pay such a notice of demand in the prescribed form specifying the sum so payable. In fact the liability to tax is created by section 3 read with the Finance Act passed each year. The liability is on the total income according to the rates mentioned as applicable to that total income, under the Finance Act and the persons whose total income is assessed become liable to that tax under the law. It is not of much significance that the mere work of calculating the amount payable by that person is not expressly mentioned as required to be done by an Income tax

(1) 1938 I T R 414 (2) (1942) 10 I T R (Supp) 121 124

Officer under section 34 (1 A) The Income tax Officer is required under the law to assess the income and even if the words be taken to have a restricted meaning the Income tax Officer after ascertaining the total income has to issue a notice of demand under section 29 because in consequence of the order passed by him determining the total income for the purposes of the Income Tax Act he has the implied duty to charge the income or determine the tax due to give effect to section 3 of the Act, read with the Finance Act of that year The second proviso to section 34 (1) which is applicable to 34 (1 A) says that the tax shall be chargeable at the rate at which it would have been charged had the income not escaped assessment etc This clearly indicates the rate to be applied and obviously no question of rate could arise if the tax had not to be determined on the basis of the total income found liable to tax After a notice of demand has been issued under section 29 there is no difficulty relating to recovery of the tax Section 45 applies to all cases where a notice under section 29 has been issued Similarly if a person is in default and has not paid the tax within the time allowed the procedure setting out the mode and time of recovery in section 46 becomes available But the person assessed under section 34 (1 A) cannot question the assessment by an appeal because a right to appeal is not given to persons who have been served with a notice of demand under section 29 This right is given to persons assessed under section 25 and to other persons affected by certain other orders mentioned in section 30 I can see, therefore, no force in the argument that section 34 (1 A) will become completely inoperative and meaningless unless the fiction referred to above is adopted in construing it

What the law says is that the other provisions of the Act, so far as may be , would apply One of the provisions of section 34 (1) is that the notice issued under that sub section is to be treated as if it were a notice issued under section 22 (2) This provision as a whole in applicable to a notice issued under section 34 (1 A)

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In my opinion it would not be correct to apply the provisions of section 34 (1) only to the extent of making a similar fiction available in respect of a notice issued under section 34 (1 A) and in holding that the rest of section 34 (1) was not applicable. So far as may be used in section 34 (1 A) means so far as the provisions as they stand can apply. The expression does not justify any amendment, adjustment or change in the provision sought to be applied so that it may suit the provisions of section 34 (1 A). In fact the same words so far as may be are used in section 34 (1) where the Legislature found it necessary to expressly state that the notice issued is to be treated as a notice under section 22 (2). The omission to expressly state this again in section 34 (1 A) has to be explained. The context shows that the omission was not merely to avoid repetition. Nor can it be said with any justification that express mention of the fiction was not made because the other provisions of the Act which were made applicable included section 34 (1). Section 34 (1) does not say that any notice issued calling for a return is to be treated as one under section 22 (2). It only says that the notice issued under section 34 (1) is to be so treated. This fiction, therefore, is not available to a notice issued under section 34 (1 A).

If the above construction be correct, section 34 (1 A), enables a person to be picked out from the general class of persons whose income has escaped assessment to be dealt with under that provision and to be subjected to a discriminatory treatment for which there is no justification. The discrimination mentioned by the Supreme Court in *Suraj Mall Mohta & Co. v. Visvanatha Sastri* (1) still persists. The discrimination according to learned counsel for the applicants is not restricted to procedure only. Besides the valuable rights of appeal and reference to higher authorities being denied a person chosen for treatment under section 34 (1 A) may be proceeded against without any limitation of time. The persons for whom eight years period of limitation is prescribed under section 34 (1 A) are persons who have omitted or failed to file a return or to disclose fully or truly all

(1) (1954) 26 I.T.R. 1

material facts necessary for their assessment If a person avoids filing a return or deliberately files a false return and gets himself assessed on that basis he is by no means a very desirable person There is nothing in section 34 (2) to show that this provision will not apply to every case of concealment of income resulting in the income escaping assessment All sorts of devices have been found to have been used by unscrupulous persons and under section 34 (1) persons who made heavy profits during the war or during other periods of difficulty for the nation have not been excepted All such persons may be proceeded against under section 34 (1) The introduction of section 34 (1 A) empowers the Income tax Officer to pick and choose some of such persons who have made profits during the war period and have escaped assessment or have been under assessed on such profits provided the profits are substantial and the test for this is that such income should not have been less than Rs 1 00 000 While the same class of persons may be proceeded against under section 34 (1) the power given to the Income tax Officer to proceed against some of the persons of that class under section 34 (1 A) which does not provide for an appeal or reference as mentioned above is clearly discrimination which offends Article 14 of the Constitution The validity of section 34 (1) was challenged on another ground before a Bench of the Madras High Court in *Sri Rajendra Mills Ltd* v *Income tax Officer* (1) But the point now raised by *Mr Pathak*, in the present cases was not raised before that Court A learned Judge of the Calcutta High Court also had an occasion to consider the validity of section 34 (1 A) in *Lakhi Prasad Shah* v *The Income tax Officer, Central Circle* ( ) A copy of the judgment was made available by learned counsel for the department In that case also the validity of the section was not challenged on the ground on which it is assailed in the instant cases These decisions therefore do not afford any guidance in the decision of the present applications

(1) (1957) 32 I T R 439

(2) Income Tax matter no 14 of 1955 decided on 12th August 1955

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Upadhya J.

It has been argued that section 34 (1 A) was introduced in the Income Tax Act because the Supreme Court had in its decisions held certain provisions of the Taxation on Income Investigation Commission Act to be *ultra vires* and as offending Article 14 of the Constitution and that therefore, the object of the Legislature was to do away with a different kind of procedure in the case of persons who had earned huge profits during the war and who were intended to be dealt with under the Taxation of Income Investigation Commission Act and to provide that the same procedure should be followed in their cases as in the case of other assessees under the Income Tax Act It is difficult to be sure as to what the intention of the Legislature was and the safest way to ascertain such intention is to look at the language used by the Legislature The authorities concerned did want such persons as had not paid proper taxes on large profits earned during the war to be treated on a different footing from ordinary assessees under the Income Tax Act It is clear from several legislative attempts made to give effect to such a desire The Excess Profits Tax Act which was passed soon after the war broke out and prices rose provided for taking away a substantial part of such profits as could be attributed to the difficult and uncertain times When the Excess Profits Tax Act had remained in force for several years and the war had ended and the authorities found that taxes had not been paid by all such persons who should have paid them on the large profits earned by them during the war and the authorities were of the opinion that the ordinary procedure prescribed under the Income Tax Act was not adequate enough to rope in such persons and recover from them the taxes which they should have paid the work was entrusted to the Investigation Commission appointed under the Taxation of Income Investigation Commission 1947 When it was found by the Supreme Court in several cases mentioned by my learned brothers, that the procedure adopted under the Investigation Commission Act was discriminatory and the relevant provisions of the Taxation of Income Investigation Commission Act were void the authorities concerned again found it necessary to ask for some statutory provision under which

their object could be achieved in a legal manner, and the Indian Income Tax Amendment Act, 1954, was introduced, and section 34 (1 A) impugned in these applications was brought on the statute book by this amending Act on the 17th July 1954 It was contended that to hold that the procedure provided under this amending Act was still discriminatory is to attribute to the Legislature an intention of persisting to prescribe a discriminatory procedure for such assessees notwithstanding the pronouncements of the Supreme Court It is not necessary to say that the Legislature deliberately flouted as it were, the opinion expressed by the Supreme Court It is possible that the attention of the Legislature was confined to the discriminatory character of the provisions which were declared invalid by the Supreme Court. In any case, it is not possible to attribute to the Legislature the intention of providing the same procedure relating to assessment, appeals and references as has been prescribed for ordinary assessees under the Indian Income-Tax Act or for assessees under section 34 (1) of the Act, in view of the different language used in section 34 (1-A) One of the arguments addressed by learned counsel for the department was that the Legislature should not be credited with an improper intention to do injustice to persons proceeded against under section 34 (1 A), while the law provided justice to those cases who are dealt under section 34 (1) of the Act In my opinion no question of any justice being done to any one or other class of persons arises The procedure laid down under section 23 of the Act which is expressly the procedure prescribed to be followed in the case of persons served with a notice under section 22 has been made available to persons proceeded against under section 34 (1) by expressly saying that the notice issued under that provision should be treated as if it were a notice issued under section 22 (2) of the Act The same was not done in the case of persons who are to be proceeded against under section 34 (1 A) The procedure to be followed in this case will be the ordinary procedure consistent with the principles of natural justice, though such procedure is not prescribed under the Act. According to the principles of natural justice, the person who is

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called upon to file a return should have an opportunity of being heard in support of his return and that he should have an opportunity of explaining such facts or circumstances as might appear to be against him and his case should be decided fairly and not in an arbitrary manner The principles of natural justice do not require that any appeal should also be provided Nor do they require that a reference on questions of law must be made The Legislature had thought it fit to prescribe a more summary procedure though before a highly qualified Tribunal when assigning such cases to the Income tax Investigation Commission and it was evidently of the view that the procedure available in accordance with the principles of natural justice should be adequate to safe guard the interests of such persons when providing that they should be dealt with by the same officer who assessed other persons under the Indian Income Tax Act But it is not necessary to indulge in surmises or to find reasons for what the Legislature has done when the language of the statute clearly expresses the intention of the Legislature

Certain principles of interpretation were also discussed at the Bar It was urged that a court should be reluctant to accept an interpretation that leads to the invalidity of a law I have no hesitation in accepting this principle But the rule would apply only if there be any doubt relating to the interpretation of the statute If the language does not admit of any ambiguity, no question of applying any such principle of interpretation could arise The Supreme Court as well as the High Courts in India have from time to time found various provisions of different statutes invalid and unconstitutional They have always had in mind the principle enunciated above but were obliged to declare the statute concerned or its provisions unconstitutional when the language used did not admit of any doubt as to the meaning of the statute It is only when two or more interpretations are possible, and that one leaning to invalidity is to be avoided

Section 34 (1 A) has also been assailed on the ground that it provides a different period of limitation for this

class of persons As observed by my brother BHARGAVA, J, in respect of one year at least persons of the same class may be dealt with by the Income tax Officer under section 34 (1) of the Act It is to my mind discriminatory to allow a larger period of limitation for the assessment of some persons who may be chosen to be dealt with under section 34 (1 A) even if it be in respect of one year of assessment On this ground too the provision appears to offend Article 14 of the Constitution

I must say that I have felt considerable hesitation in expressing my dissenting views because of certain observations made by the Supreme Court in *Sree Meenakshi Mills* v *Sri A V Viswanatha Sastri* (1) In that case section 5 (1) of Act XXX of 1947 was impugned and in that connection section 34 (1 A) inserted by Act XXXIII of 1954 was considered as intending to deal with the class of persons who were said to have been classified for special treatment under the Taxation of Income Investigation Commission Act In that case, however, no question was raised as to whether the procedure to be followed in the case of persons to be dealt with under section 34 (1 A) was different from the procedure prescribed for the persons to be proceeded against under section 34 (1) of the Act The Supreme Court, if I may say with great respect, proceeded to decide the case on the assumption that the procedure under section 34 (1 A) was the same as that under section 34 (1) of the Income Tax Act I have tried anxiously to study the case and to see if the points now raised did come to the notice of the Supreme Court in that case, for even the assumption on which the Court proceeded, is entitled to respect and consideration I could not find any light in that decision on the questions now raised by the present applicants As I could find no justification for ignoring the patent difference in language used by the Legislature in section 34 (1 A) and in section 34 (1), I thought it proper to express my own views

On the other ground, which in fact was raised by the Advocate General, in a connected case that the provision in the law that an Income tax Officer should decide what

(1) (1954) 26 I T R 713

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tax he would impose on an assessee offended against the principles of natural justice, I would agree with my esteemed brothers The principles of natural justice could be called in aid only if the provisions of the statute were not available It is for the Parliament to consider and recognize the principles of natural justice and to embody them, so far as it considers proper, in the statutes enacted If the Parliament considered it proper that the assessment of tax should be made not by a regular court but by an officer of the Income tax Department, the Legislature was fully competent to give effect to this view in the law it made For several reasons administrative Tribunals are increasingly coming into vogue The multifarious duties which a modern State is called upon to undertake make it impracticable that the normal procedure for adjudication of disputes by courts may be resorted to in every case What tax a person should pay and who should be held liable to pay taxes on different kinds of income, are questions of considerable importance and certainly affect the persons concerned much more than a small claim in a court of law Similarly questions relating to labour and trade unions and constructions within municipalities, etc, give rise occasionally to very important questions involving considerable sums of money and yet an ordinary court has not been found to be a convenient forum for the settlement of such disputes and a large number of authorities and Tribunals have sprung up to deal with these matters It was competent for the Legislature to lay down that the imposition of the income tax payable should be made by an Income tax Officer who should decide all relevant matters relating to such assessment It may be noticed that provisions relating to appeals to the Appellate Assistant Commissioner and the Income tax Appellate Tribunal enable an assessee to get his matter heard by persons other than those who are responsible for the levy and collection of the tax This is calculated to ensure impartial decision of the questions raised at the assessment The provisions relating to a reference to the High Court and then an appeal to the Supreme Court further ensure that the law will be correctly interpreted and applied As observed by my brother BHARGAVA, J, the facts in

G Nageswara Rao v *A P S R T Corporation* (1) were quite different and the rule laid down by the Supreme Court in that case does not apply to the present application

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Before parting with this judgment I must acknowledge the help received from the illuminating and learned argument addressed by *Mr R S Pathak* for the applicants and *Mr Gopal Behari* for the department

For the reasons given above I am of opinion that section 34 (1 A) offends Article 14 of the Constitution and is invalid I would, therefore, allow the applications with costs

By the Court—Both the writ petitions are dismissed with costs, which will include Rs 400 in each writ petition as fee of learned counsel for the department.

Petitions dismissed

APPELLATE CIVIL

Before Mr Justice Gurtu and Mr Justice Dwivedi

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August 4

RAM SWARUP AND ANOTHER (DEFENDANTS)

v

FATTU (PLAINTIFF)

Warranty of title—*Express contract of indemnity for breach of—Effect of, on the rights and liabilities under the statutory covenant—Transfer of Property Act,* 1882, *s* 55 (2)

The express contract for the refund of sale consideration in case of vendee s dispossession from the property sold for want of vendor s title does not deprive the vendee of his right to rely, if necessary, on the statutory warranty ensured by s 55 (2) of the Transfer of Property Act and recover satisfaction for the compensation paid in compromising the suit for possession of that property by persons entitled to it

Where the vendor is a party to the suit so compromised and prefers to allow it to conclude *ex parte* as against him, he cannot insist on or avail of the absence of an express notice to him as a safeguard against improvident bargain.

Narain Kisan v *Bhawrao Sankharam* (2) and *Durga Kumar* v *Kali Charan* (3) referred to

(1) A I R 1959 S C 308 (2) A I R 1956 Nag 124
(3) (1913) I L R 35 All 168

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RAM SWARUP v. FATTU

Second Appeal No 707 of 1951, from a decree of Prem Prakash Additional Civil Judge, Muzaffarnagar, dated the 17th February 1951

The facts appear in the judgment

Yudhistra for the appellant

M H Beg for the respondent

GURTU, J —The sale deed in this case was executed by Ram Swarup, one of the defendant appellants before us, on his own behalf and on behalf of his brother Joti Prasad, the second appellant before us transferring certain property to Futtu, who is the plaintiff respondent in this appeal

The vendee was put in possession of the property The sale consideration paid by the vendee was Rs 500 In the sale deed, there was a covenant to the following effect

> Aur makan mubayya par mushtari ka qabza kara diya Agar jur ya kul qabza mushtari se nikal jawe to mushtari ko ikhtiyar hoga ki zare summon mae sood wapas wasool kar le

Two sons of Ram Swarup appellant, namely, Daya Prakash and Anand Prakash, filed a Suit no 1178 of 1944 claiming that the property transferred was a joint Hindu family property and was not liable to be transferred for want of legal necessity To that suit, they impleaded Futtu, the vendee, and also their uncle, Joti Prasad as also their father, Ram Swarup, the two vendors The last named two persons i e , the vendors did not contest the suit at all and did not file any written statement The suit was ultimately compromised between Futtu and the plaintiffs of that suit , the compromise being that if Futtu paid Rs 1,100 to the plaintiffs of that suit within a period of six months, then the plaintiffs' suit would stand dismissed and Futtu s possession over the vended property would remain undisturbed

It appears that the sum of Rs 1,100 was not paid within the stipulated time but in execution proceedings there was a further compromise wherein the sum of Rs 1 100 was raised to Rs 1,900, which was paid and Futtu remained in possession of the vended property

Then Fattu filed the present suit claiming damages for breach of the warranty of title

The suit was defended The learned Additional Munsif dismissed the suit holding that the plaintiff had no cause of action against the defendants

Upon appeal before the learned Additional Civil Judge, the appellate court has allowed the appeal and decreed the plaintiff s suit for Rs 520, i e , the amount of damages which were claimed The view of the court below was that there had been a breach of the warranty and that the plaintiff had suffered more damages than Rs 520 which was claimed In the result as indicated earlier, the plaintiffs suit was decreed for a sum of Rs 520

Before the said court below, a contention was raised that the plaintiff was only entitled to a relief in terms of the covenant which we have quoted herembefore and that inasmuch as there was no loss of possession, there was no right to recover damages from the vendors The court below repelled this contention and held that the plaintiff was entitled to recover the same under the general law of property It held that the plaintiff could avail of the benefits of section 55 (2) of the Transfer of Property Act which indicates that the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same The court below rejected the contention that by entering into the specific covenant, which has been quoted here inbefore the parties have contracted themselves out of section 55 (2) of the Transfer of Property Act The view of the court below was that unless there had been a contracting out of section 55 (2), Transfer of Property Act in case of a breach of warranty damages could always be claimed by the vendee and that any special covenant entered into between the vendor and the vendee did not deprive him of the right to claim damages on a breach of statutory warranty The said court has found that it was proved in the suit upon the evidence tendered that Ram Swarup had two other sons and that the representation made in the sale deed that

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Gurbir J

the property was the sole property of Ram Swarup and his brother, Joti Prasad, was not correct The court below had also held that the question of a breach of warranty already stood decided by the decree Ex 2 on this record, passed in Suit no 1178 of 1944

The appellants, Ram Swarup and Joti Prasad, in this appeal have re urged the point taken in the court below The contention of learned counsel is that inasmuch as there was an express covenant wherein it was stipulated that in case of possession being either wholly or partially lost over the property, the sale consideration with interest would be recoverable, therefore, the warranty which is implied in section 55 (2) of the Transfer of Property Act must be deemed to have been given up by the vendee under the contract In our view, the court below was clearly right in holding that the specific covenant aforesaid did not destroy the statutory warranty given under section 55 (2) aforesaid The covenant entered into between the parties dealt with only one specific case and that was that if *qua* the vended property possession was disturbed then in such a case, the vendee was given a right to recover the sale consideration with interest It did not deal with cases uncovered by that covenant and the general right given by section 55 (2) of the Transfer of Property Act, in our view, remained intact There is nothing in the contract to show that that right has been specifically contracted out and we are in agreement with the view of the court below that the general right under the Transfer of Property Act still remains intact, particularly because the covenant between the parties is, in no way, inconsistent with section 55 (2) of the Transfer of Property Act

The next contention raised by learned counsel was that the court below had wrongly considered that the question of warranty of title had already been decided *inter partes* by the decree passed in Suit no 1178 of 1944 It is correct that the court below seems to think that the matter relative to warranty of title was concluded by the decree passed in that suit, which is Ex 2 on the record of this case We are of the view that that decree did not operate as *res judicata* at all because in

that suit, the vendors and the vendee were both arrayed as defendants and the determination of rights *inter se* was not necessary for the purpose of disposal of the suit, nor was there any such determination either directly or even by implication The vendors did not even put in appearance and the suit proceeded *ex parte* against them and the plaintiffs suit as against the vendee was disposed of in terms of a compromise entered into between them Therefore, clearly the judgment and decree in that suit cannot operate as *res judicata* between the present plaintiff and the present defendants, namely, the vendors and the vendee but it is undoubtedly evidence of the fact that there was a suit brought by the sons as against the vendors and the vendee and it is also evidence of the fact that a compromise entered into under which the vendee was required to pay a certain sum of money to the plaintiffs in order that the plaintiffs suit should stand dismissed and in order that he might retain the property These facts are established by the judgment but the judgment or decree in that suit does not operate as *res judicata* Fortunately, in this case the plaintiff went into the witness box and the defendants have also gone into the witness box and the court below has recorded an independent finding based on the oral evidence tendered That court has pointed out that lack of full ownership is apparent from the deposition of Ram Swarup, one of the defendants wherein he says that he had told the vendee that he had got three other sons alive and that the vendors were not the sole owners of the disputed property It is evident from a perusal of the evidence tendered that this conclusion of the court below is correct The defendants in the suit have nowhere denied that the sons also had a share in the property As a matter of fact, they wanted to suggest that the plaintiff had full knowledge of there being three sons But the assertion in the deed is quite different There is no duty cast on the vendee to make enquiries and he may accept the representation made to him by the vendors in regard to the latters title In the circumstances, the court below was right in finding that there had been a misrepresentation in regard to

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RAM SWARUP v. FATTU

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title and that the warranty had been broken In the circumstances, damages clearly became payable

Learned counsel has then contended that the damages awarded were excessive, that the vendors did not put in appearance in the previous suit and, therefore, the settlement made between the vendee defendant on the one side and the plaintiffs of that suit on the other could not be said to be a settlement which would necessarily be binding on the vendors and he urged that it was open to the vendors to show that the vendee had paid an excessive sum of money in order to retain possession of the property

He then said that no notice had been given to the present defendants the vendors, before the vendee entered into a settlement with the plaintiffs and they were entitled to question the agreed sum In our view, the fact that no notice had been given would certainly entitle the defendants to say that the question of quantum of damages could not be deemed to have been finally disposed of

Even though it was open to further consideration in this suit as to what damage should be awarded, it seems to us in the circumstances that inasmuch as the court below has only decreed the suit for Rs 520 as against Rs 1,100 which the vendee had agreed to pay to the plaintiffs of the previous suit, it cannot be said that the damages have not been properly assessed by the court below

It was next contended that inasmuch as the property had been sold, in the first instance, for Rs 500 only the sons share would be only one half of Rs 520 and damages should not exceed Rs 260 We do not think that this is the correct way of looking at the matter The correct way of looking at the matter would be to see as to what sum the vendee would be justified in paying to persons who had a title and who could dispossess the vendee at least *qua* their shares We consider that in view of the fact that the vendee had already incurred additional expenses in improving the property, he must have been at a disadvantage in bargaining and in the

circumstances, he probably could not make a better bargain In the circumstances the sum of Rs 520 does not appear to be an excessive amount

It is to be noted that the vendors were parties to the earlier suit and they kept out of the proceedings and allowed the suit to be disposed of *ex parte* They could have spoken in support of the title they had asserted in their deed and if they had done so, there might not have been a necessity to enter into a compromise or the compromise would have been effected at a mere nominal sum We consider that the action of the vendee in compromising the earlier suit and at the figure cannot be seriously questioned in these proceedings

In *Narayan Kisan* v *Bhaurao Sonkharam* (1), where the vendor who was impleaded as a defendant to the suit impeaching his title and claiming the vendee s eviction remained *ex parte*, though the question of title was a matter within his special knowledge, and, therefore the vendee compromised the suit and subsequently filed a suit for damages against the vendor for a breach of the covenant, it was held that the vendor was liable for damages and he could not have imputed bad faith to the vendee for compromising the suit Nor do we think that it can be seriously contended in this case that the vendee, who had, as already indicated, spent money in improving the property, could have allowed it to go out of his possession and then claim re imbursement of the sale consideration together with interest Where titles are challenged when the warranty is defective, vendees have often compromised with the person challenging the title and they have been held entitled to claim damages from their vendors

We may refer to one of such cases, which is reported in *Durga Kunwar* v *Kalicharan* (2) In that case, it was indicated that if a demand about certain property was made which a person indemnifying is bound to pay and notice is given to him of the demand on which he takes no action and the person to be indemnified compromises the dispute before the suit is brought, the

(1) A I R 1956 Nag 124 (2) (1912) I L R 35 All 168

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RAM SWARUP v. FATHU

Gurbir J

indemnifying party is not entitled to come forward and say that it was not a fair and reasonable one

No doubt in this case no notice, as such, was given but the defendants were parties to the suit and it was their duty, having given a warranty, to come forward and defend the suit rather than to allow the suit to proceed *ex parte*, and even if we do not hold that the conduct of the defendants was suspiciously collusive, in our view the fact that they had been made defendants was enough to give them notice that the suit might be compromised In fact, they probably knew the exact position The plaintiffs were their relations, being the sons of Ram Swarup, who was one of the defendants, and they probably knew that the vendee had already spent a sum of money on improvements We do not think that a direct notice is always required Moreover, *Durga Kunwar's* case (1) was a case where the compromise had been entered into even before the suit

Having considered the entire matter, we have come to the conclusion that the judgment of the court below appealed against is correct In the circumstances, we dismiss this appeal with costs

Appeal dismissed

CRIMINAL MISCELLANEOUS

Before Mr Justice Bhargava and Mr Justice Sahai

1959

August, 5

THE AGRA ELECTRIC SUPPLY COMPANY AND ANOTHER

v

STATE AND ANOTHER

Criminal Proceedings—*Inherent power of High Court to interfere in—When exercised—Revisional power of High Court—Exercise of, in pending cases—Code of Criminal Procedure 1898, ss 439 and 561 A*

Of the several complaints filed against different branches of the U P Electricity Supply Company some were against the company alone some against the company through their Resident Engineer who it was prayed should be tried for the offence

(1) (1913) I L R 35 All 168

committed by the company and others against the company as also certain other persons such as the Governing Director Chief Engineer or Resident Engineer in their personal capacity The respective Magistrate took cognizance of these cases and the proceedings reached the stage in all cases of the issue of summonses for the appearance of the accused in some appearance had been entered while in others prosecution evidence had been recorded

On an application to the High Court under s 561 A of the Code of Criminal Procedure for the appropriate relief against the above proceedings on the ground (a) that the alleged breach of the provisions of the Indian Electricity Act or the Rules made thereunder did not constitute a crime and could at best involve a civil liability or the cancellation of the licence issued to the company (b) that on the face of the complaint itself there was no justification for the trial of or the issue of the process against the individuals

Held, (1) that the inherent power of the High Court preserved under s 561 A of the Code could not be invoked, whereas in this case an appropriate relief was available under the express provisions of the Code

(2) as to (a) that this objection could well be taken before and must in the initial stage be left for the decision of the Magistrate himself and the applicants could ultimately come to the High Court through a reference or revision against that order and as to (b) that the proceedings against the individuals were illegal and must be quashed and the Magistrate, in other cases must be directed not to issue any process in the name of Resident Engineers in their personal or even representative capacity

Held, further, that the aforesaid relief could, however, be granted by the High Court not under s 561 A, but under s 439 either by treating the application as such or acting *suo moto* on information so received.

Criminal Miscellaneous Application No 2746 of 1958 (connected with Criminal Miscellaneous Applications nos 2747 to 2751 of 1958, 2829 and 2830 of 1958, 47 and 48 of 1959, 504 to 506 of 1959, 638 of 1959 and 1209 of 1959)

The facts appear in the judgment

Jagdish Swarup and *D D Seth* for the applicants

Gopal Behari for the opposite parties

BHARGAVA, J —These fifteen applications were presented before a learned Single Judge of this Court invoking

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Bhargava, J

its powers under section 561 A of the Code of Criminal Procedure The powers were sought to be invoked in respect of fifteen different cases which are pending in the Courts of Magistrates in this State in various districts In all these cases amongst the accused is the local electric supply company also The designation of the electric supply company varies from place to place As an example, in Misc Case no 2747 of 1958 the supply company which is accused no 1 is the U P Electric Supply Company, Limited, Allahabad In Misc Case no 2746 of 1958 the first accused is the Agra Electric Supply Company Limited, Agra In case no 1209 of 1959 the first accused is the Agra Electric Supply Company Limited, Agra It is not necessary to give the description of each electric supply company in each of these cases It is enough to say that all these companies are incorporated under the Indian Companies Act and the managing agents of these companies are Messrs Martin Burn Limited In the heading in the complaint in Case no 2830 of 1958 the electric supply company alone is mentioned, without mentioning through whom the company was impleaded as accused In cases nos 2748, 2750, 2751 and 2829 of 1958 and nos 47, 48 and 638 of 1959 the supply companies have been impleaded as accused through their respective Resident Engineers In cases nos 504 and 506 of 1959 the companies have been impleaded through three different persons in each case and in Case no 2746 of 1958 the company has been impleaded through four persons In four cases nos 2747 and 2749 of 1958 and no 505 and 1209 of 1959 not only have the companies been impleaded as accused but, in addition, certain other persons have also been impleaded as accused. These additional accused in these four cases are either the Governing Director or Directors of the managing agents Messrs Martin Burn Limited, or the Chief Engineer or the Resident Engineer of the company concerned It appears, however, that, even in cases where the only accused impleaded is the electric supply company confined, the prayer at the end in the complaint is that the Magistrate after taking cognizance of the offence

committed by the company should put on trial the Resident Engineer himself One ground on which the powers of this Court are invoked by the applicants in these applications is that, on the facts given in the complaints and the prayers made in them there was no justification for the trial of the individuals, whether Resident Engineers or others in their personal capacity Two other objections that were taken based on grounds arising from the particular offences alleged to have been committed on the facts mentioned in the complaints One set of cases relates to prosecutions under section 47 of the Indian Electricity Act, 1910, for non observance of the provisions of clause (vi) (1) of the schedule to that Act Another set of cases relates to the offence punishable under rule 141 of the Indian Electricity Rules on the allegation of the non observance or breach of rule 54 of those rules Learned counsel for the applicants in these applications urged that these prosecutions were not at all justified inasmuch as the provisions, the breach of which was alleged against the accused and was the subject matter of the complaints, were such that their breaches might give rise to civil liabilities or to the liability of cancellation of licences or other penalty but could not be the subject matter of a criminal prosecution

We have heard *Mr Jagdish Swaroop* for the petitioners and *Mr Gopal Behari* for the U P Electric Inspector as also U P State

When these applications came up for hearing before us a preliminary question arose as to whether, in the circumstances which have been mentioned above, this Court would ha justified or would ha acting properly in exercising its extraordinary power under section 561 A of the Code of Criminal Procedure as prayed for by the applicants It appears to us that the remedy which has been sought by the applicants is not appropriate and there are no sufficient grounds for the exercise of the power under section 561 A of the Code of Criminal Procedure by this Court In all these cases, summonses have been issued by the Magistrates for attendance of the accused In some cases all the accused have put in appearance, while in others only some have done so In

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one case, we are told, proceedings have reached the stage where prosecution evidence has been recorded and only the recording of the defence evidence remains It appears to us that the points which are being raised before us by means of these applications could have been easily raised and should appropriately have been raised by the accused before the Magistrates, who had taken cognizance of these offences If the points could be decided without recording any evidence, the Magistrates could have been requested to decide those points and drop the proceedings in case they came to the view that the prosecution could not proceed The interpretation of the rules or the provisions of the Act must at the initial stage be left to the Magistrates concerned It is for them to decide what are the rules, the non observance of which renders the persons responsible for the observance of those rules liable for prosecution for the offence made punishable either under section 47 of the Indian Electricity Act or under rule 141 of the Indian Electricity Rules We do not think that it will be at all proper for us to go into this question at this stage If the accused invite a decision on these points at a preliminary stage and the Magistrate gives his decision one way or the other, the party aggrieved can always seek appropriate remedy by moving a revision application before the Sessions Judge or the District Magistrate requesting that a reference be made to this Court and, if even that request is refused, by presenting a revision application in this Court That is the appropriate remedy which is provided under the provisions of the Code of Criminal Procedure and while such a procedure exists we do not think that we are called upon to exercise our extraordinary powers under section 561 A of the Code of Criminal Procedure

There, however, remains the question relating to the proceedings being taken in these complaints against the persons who are either Resident Engineers of the various supply companies or Governing Directors of the managing agency company or the Chief Engineer of the supply company It has been urged by *Mr Jagdish Swaroop* on behalf of the applicants that at least the proceedings

against these individuals are totally unjustified because the complaints themselves do not make out that any offences have been committed by them This is also a point which could have been taken before the Magistrate who could have decided it but considering the circumstance that the copies of all the complaints in all the cases have already been put before us and arguments have also been addressed to us by learned counsel for the parties on this point and having regard to the further fact that at least in one case the Magistrate has continued the proceedings to the extent of recording the whole prosecution evidence, we think that this is a point which should appropriately be considered by us at this stage as further continuance of the proceedings against these individuals if not at all warranted by law, would wholly result in their unnecessary harassment Having considered this aspect of the matter carefully, we are still of the opinion that it will not be proper for us to exercise our extraordinary powers under section 561 A of the Code of Criminal Procedure It appears to us that the power which we can properly exercise and should exercise is the one conferred on us by section 439 of the Code of Criminal Procedure Ordinarily we would have directed the applicants to move the Magistrates and request them to drop the proceedings against these individuals on the ground mentioned above and if the Magistrates had refused to do so the applicants could have come up and moved us under section 439 of the Code of Criminal Procedure either directly or through the Sessions Judge or the District Magistrate There is however, another aspect which is to be kept in view and it is that in all these cases the Magistrates issued summonses for the appearance of these individual accused under section 204 of the Code of Criminal Procedure and the question that is being raised really goes to the extent of challenging the correctness and validity of the proceedings taken by the Magistrates in these cases The Magistrates could issue summonses for the appearance of these persons as accused only if in their opinion the complaints taken together with any statements recorded or enquiries made under sections

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200 to 202 of the Code of Criminal Procedure showed that an offence had been committed by each of these individual accused in respect of which summonses could issue against them In this case it is not suggested that after the complaints were filed any statements were recorded under section 200 of the Code of Criminal Procedure In fact, since the complaints were filed by a public servant, Section 200 of the Code of Criminal Procedure did not require his statement to be recorded It is also not suggested that any enquiry was made under section 202 of the Code of Criminal Procedure so that for the purpose of forming his opinion in order to issue summons under section 204 of the Code of Criminal Procedure the only material available to the Magistrates were the various complaints We have therefore to see whether the Magistrates in issuing the summonses acted rightly and, in view of the fact that some of the persons who are being summoned as accused are not even residing in U P but at long distances we think that these cases are appropriate where we should exercise our powers under section 439 of the Code of Criminal Procedure either on the basis that we should treat these applications as applications under section 439 Criminal Procedure Code, or, in the alternative, on the basis that information having come to us by means of these applications it would be appropriate for us to exercise our powers *suo motu* under section 439 Criminal Procedure Code It is in this light that we have heard learned counsel for the parties on this point

It appears to us that in 11 of the cases barring four cases, to which miscellaneous cases nos 2749 and 2747 of 1958 and no 505 of 1959 relate, the only person mentioned as the accused in the heading was the electric supply company concerned In one case it was not mentioned through whom the company was impleaded as an accused whereas in all other cases the company was impleaded as accused through the Resident Engineer In most of those cases though in the body of the complaint the allegations were in respect of acts of omissions by the electric supply company concerned only and

though in the prayer the first part was that the Magistrate is requested to take cognizance of the offence committed by the company, the last part of the prayer was that the person to be put on trial after cognizance was taken was the Resident Engineer It also appears that as a result of this prayer the Magistrates very lightly issued summonses for the Resident Engineers themselves instead of issuing summonses for the appearance of the electric supply companies through the Resident Engineers Since in the complaints themselves, there was no mention that the Resident Engineers as such had committed any offence and even in the first part of the prayer the request to the Magistrate to take cognizance was only in respect of the offence committed by the companies it is clear that the prayer for putting the Resident Engineers personally on trial was very inappropriate and should not have been granted by the Magistrates In all those cases, the accused who was to be tried and who should have been tried was the electric supply company concerned though all the time the company could be directed to put in appearance as accused through the Resident Engineer We consider that this aspect having come to our notice, a direction should be issued to all the Magistrates concerned to make sure that the trials before them proceed against the electric supply companies through the Resident Engineers concerned, and not against the Resident Engineers themselves in their personal capacities or even by describing the prosecution as being in their representative capacities When the Resident Engineers appear the appearance would be treated as the appearance of the company being prosecuted We direct the Magistrates to proceed accordingly

Then there remain the four cases in which apart from the companies, certain individuals have been impleaded as accused in their personal capacities We have carefully gone through the complaints in those four cases and we find that in none of those complaints are any facts alleged which would show that there was any breach or non observation of any provision of the Act schedule or rules of the Indian Electricity Act by

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any act of commission or omission on the part of the individuals There is not even any suggestion that if there has been any non observance of any rule or breach of any rule on the part of the electric supply company which is the principal accused in each of these cases the responsibility for that non observance or breach lay on any of these individual accused We may also mention that, in all these four cases, the stage at present is that the examination of prosecution witnesses has not yet started In some probably all the accused have put in appearance, while in others that is not so In fact, the information of the learned counsel appearing for the State in these cases is that in none of these four cases have the individual accused yet appeared Consequently in deciding whether the prosecutions can continue the only material available are the four complaints in the four cases and there is no additional material by way of evidence which needs to be considered by us On the facts given in the complaints it is clear that the facts alleged by the complainant do not even make out a *prima facie* case against any of these individuals for breach of any of the rules framed under the Indian Electricity Act or the provisions of that Act as there are no incriminating allegations against these individuals The proceedings that are being taken in the trial of these individuals are therefore, without any justification No summonses should have been issued against them under section 204, Criminal Procedure Code and they should not have been put on trial In cases where they are not yet on trial there is no justification for enforcing their attendance in court and putting them on trial We, therefore, consider that the proceedings against these individuals going on under these complaints should be quashed by us in exercise of our powers under section 439 of the Code of Criminal Procedure We accordingly quash all proceedings in these four cases against these individual accused and set aside the orders of the Magistrates directing issue of summonses for their attendance under section 204 Criminal Procedure Code We may make it clear that this order will in no way affect proceedings which might be taken by the

Magistrates on these complaints against the electric supply companies concerned provided those proceedings are taken in accordance with the principle which we have laid down in connection with the remaining 11 accuesd The stay orders in all these cases are discharg ed

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THE AGRA ELECTRIC SUPPLY COMPANY v STATE

Applications allowed

CIVIL MISCELLANEOUS

Before the Honourable O H Mootham, Chief Justice, and Mr Justice Mukerji

(1959 August 17)

T P BHALLA, *in the matter of enrolment*

Enrolment of Advocates—*Power of High Court in matters of—Provisions under the Letters Patent—Subject to those under Bar Councils Act and the rules thereunder—letters Patent (Allahabad) 1866 cls (7) and (8)—United Provinces High Courts (Amalgamation) Order, 1948 cl 8—Indian Bar Councils Act 1926 ss 9(1) 19(2)—Allahabad Bar Council Rules, r 1*

Judicial Office —Meaning of for purposes of enrolment as an Advocate

The power of the High Court regarding the enrolment of Advocates under clauses 7 and 8 of the Letters Patent preserved through cl 8 of the Amalgamation Order must now be read in conjunction with and as subservient to the provisions of the Bar Councils Act and the rules framed thereunder and the position now is that while the High Court retains unfettered power to refuse in its discretion admission to any person to the roll of Advocates it can no longer admit as an Advocate a person who is not qualified under the Act and the rules aforesaid

Pramesh Chandra Gupta v The Registrar, High Court of Judicature at Allahabad (1) and *M Abdul Towheed v The Patna High Court Bar Council* (2) distinguished

The enrolment of a person as an Advocate on the ground of his having held Judicial office is confined exclusively to members of a judicial service and is not available to persons of any other service even though it may involve performance of duties of a judicial nature

In the matter of enrolment of Shri *H P Chaudhari* (3) relied on

(1) 1 L R [1955] 1 All 243 (2) A I R 1957 Pat 610
(3) 1959 A L J 212

1959

T P BHALLA IN THE MATTER OF

Civil Misc Case No 161 of 1959

The facts appear in the judgment

The judgment of the Court was delivered by—

for the Applicant

for the Bar Council

MOOTHAM, C J —We have before us to day an objection by the Bar Council to the admission of Sri Tejasvi Prasad Bhalla as an Advocate in this Court

Rule 1 of the Rules made by the Bar Council under section 9 of the Indian Bar Councils Act states generally the qualifications for enrolment as Advocate but to this rule there are a number of provisions of which the first, so far as it is relevant, reads thus

> Provided firstly, that a person who is a graduate in law may be admitted to the Roll of Advocates (if)
>
> (c) he has held judicial offices for more than ten years in British India, Dominion of India or India, as the case may be

It is Sri Bhalla s contention that he fulfils the requirements of this proviso

Sri Bhalla was appointed to the Indian Police in the year 1923 and he rose to the high office of Inspector General of Police, U P , in January, 1953 This office he held until October 1954 Prior to being appointed Inspector General of Police he had acted as the Provincial Transport Commissioner as a Member of the Air Transport Licensing Board and as Director General, Civil Aviation India After his retirement as Inspector General of Police Sri Bhalla was appointed a Member of the Uttar Pradesh Public Service Commission an appointment which he held from January 1955 to January 1959 His submission is that as in the course of his duties in the various offices which he had held he had from time to time to perform duties which were of a judicial nature he can properly be said to have held judicial office within the meaning of clause (c) of the proviso to rule 1 and, as he had performed such

duties for a period exceeding ten years he is qualified for enrolment The meaning of the expression Judicial office was considered by this Court in *In the matter of enrolment of Sri H P Chaudhari* (1) In that case the Court held that these words as used in clause (*c*) to proviso to rule 1 referred exclusively to members of a judicial service Sri T P Bhalla has suggested that this Court in *Sri H P Chaudhari s* case (1) placed an unduly narrow interpretation on the phrase Judicial office With this view we are, however unable to agree and we are not satisfied that we should be justified in referring that decision to a large Bench for further consideration

Sri Bhalla then contended that even though he may not possess the qualifications which would entitle him to enrolment under the Rules made by the Bar Council this Court has nevertheless the power to admit him as an Advocate of the Court, if it thinks it proper to do so Mr Bhalla has placed much reliance on the provisions of clause (7) and (8) of the Letters Patent dated the 17th March 1866 constituting the old High Court at Allahabad By these clauses the High Court was authorized and empowered to admit and enrol such and so many Advocates Vakil and Attorneys as it deemed fit and there is no doubt that the new High Court continues to possess the powers vested in the old High Court by virtue of clause (8) of the United Provinces High Courts (Amalgamation) Order 1948 The power possessed by the High Court to enrol Advocates conferred upon it by the Letters Patent must however be read in conjunction with the provisions of sections 9 (1) and 19 (2) of the Bar Councils Act, 1926 Section 9 (1) provides that—

> 9 (1) The Bar Council may, with the previous sanction of the High Court make rules to regulate the admission of persons to be advocates of the High Court
>
> Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion

(1) 1959 A L J 212

1959

T P BHALLA IN THE MATTER OF

Mootham, C J

Section 19 (2) then provides that—

(2) When sections 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder be deemed to have been repealed

The position therefore is that the Bar Council has with the previous sanction of this Court made rules regulating the admission of persons to be Advocates of the Court and we think it to be sufficiently clear that the proviso to section 9 (1) of the Act, which reserves to the Court an unfettered power to refuse admission to any person at its discretion by implication shows that this Court can no longer admit as an Advocate a person who is not qualified for admission under the rules made under section 9

Sri T P Bhalla invited our attention to a passage at page 111 of the Report of the case of *Pramesh Chandra Gupta* v *The Registrar, High Court of Judicature at Allahabad* (1) in which a Full Bench of this Court expressed the opinion that the Rules made by the Bar Council were merely directory That case, however, was a somewhat unusual one The question before the Court was whether in the absence of a Bar Council it was within the power of the High Court to enrol Advocates the obstacle to their enrolment being the inability of the Registrar to comply with rules 4 and 5 of the Rules which required him to serve upon the Secretary of the Bar Council a copy of every application for enrolment and which entitled the Bar Council to prefer an objection to the enrolment The Court pointed out that there is a distinction between the jurisdiction to enrol a candidate as an advocate and the procedure to be followed in making the enrolment and we think that the Court's opinion that the rules were directory only had reference only to those rules regulating the procedure to be followed, particularly rules 4 and 5

(1) I L R [1959] 1 All 243

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T P BHALLA, IN THE MATTER OF

Meotham, C J

We were also referred to the decision of the Patna High Court in *M Abdul Towheed v The Patna High Court Bar Council* (1) That was a case in which the High Court had directed that a retired officer of police should be enrolled as an Advocate of the Court The High Court however, acted under a particular rule of the rules framed by the Patna High Court Bar Council which specifically empowered the Court in special cases and after consultation with the Bar Council to exempt any candidate from all or any of the requirements of the rules There is no similar provision to be found in the rules framed by the Bar Council of the Allahabad High Court

We accordingly are of opinion that Sri T P Bhalla is not at present qualified for enrolment as an Advocate and we uphold the objection of the Bar Council

Application rejected

APPELLATE CIVIL

Before Mr Justice Gurtu and Mr Justice Dwivedi

1959

August 20

DEO PRAYAG SINGH (PLAINTIFF)

v

UTTAR PRADESH GOVERNMENT (DEFENDANT)

Revenue—*Claims and recovery of—Plea of lack of power or mala fides—Jurisdiction of Civil Courts, whether barred—Uttar Pradesh Land Revenue Act 1901 s 233 (m)*

The bar under s 233 (*m*) of the Land Revenue Act to the jurisdiction of the Civil courts in matters connected with the claim or recovery of revenue or sums made realisable as such does not apply to cases of want or *mala fide* exercise of power in or by the Government or authority concerned

Thin Yick v Secretary of State for India in Council (2) *Lady Dinbai Dinshaw Petit v The Dominion of India* (3) and *Firm Ralla Ram Raj Kumar v Union of India* (4) relied on

First Appeal No 133 of 1952, from a decree of Jagmohan Lal Civil Judge, Gorakhpur dated 4th April 1952 in Suit No 84 of 1951

(1) A I R 1957 Pat 610
(2) I L R [1939] 1 Cal 257 (P C)
(3) A I R 1951 Bom 72
(4) A I R 1952 Punj 340

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DEO PRAYAG SINGH v. UTTAR PRADESH GOVERNMENT

The facts appear in the judgment

Ambika Prasad and *C B Misra* for the appellant

The Standing Counsel for the respondent

GURTU, J —This is a first appeal from the judgment and decree of Sri Jagmohan Lal, Civil Judge Gorakhpur dated the 4th April 1952 By that judgment, the plaintiff s suit has been dismissed upon the ground that it was barred by section 233 (*m*) of the U P Land Revenue Act The question of the bar of section 233 (*m*) has been disposed of as a preliminary issue

Before we deal with the contentions advanced before us it is necessary to refer to the plaint The plaint alleged that the plaintiff was Zamindar and an Advocate but his activities were confined to looking after his Zamindari only, that there was one Sri Kishan Saran Chand father of Sri Bhagwat Chand, that the former took a contract of the Gorakhpur Birdghat ferry from the Public Works Department, Gorakhpur for a period of three years beginning from the 15th of April 1948 to the 14th of April 1951 that the lease amount of the said contract was Rs 2 45 555 that Sri Kishan Saran Chand died and his son Sri Bhagwat Chand succeeded and carried on the contract taken by his father that due to various causes Sri Bhagwat Chand suffered a heavy loss in the running of the ferry and he could not pay the dues of the Public Works Department relating to the contract regularly that, therefore the District Magistrate took possession of the ferry from the said Sri Bhagwat Chand in the month of January, 1951 i e before the expiry of the lease term that Sri Bhagwat Chand was related to the plaintiff and he went to the plaintiff for legal advice and help and also requested the plaintiff to move the Public Works Department authorities, Gorakhpur, for remission in the contract money as there had been a loss owing to unforeseen circumstances, that the Public Works Department authorities were asserting that a sum of Rs 1 08 616 9 was due from Sri Bhagwat Chand and had attached his property, that the plaintiff under the said Sri Bhagwat Chand s instructions made an application to the Public Works Department authorities inclu

ding the Superintending Engineer representing Bhagwat Chand s case and prayed on his behalf for a substantial remission but the plaintiff s endeavours did not succeed that the Tahsildar of Sadar Tahsil Gorakhpur, without any ground or reason called upon the plaintiff to pay the entire dues owing by Sri Bhagwat Chand to the Public Works Department that the action of the Tahsildar in calling upon the plaintiff and asking him to pay the dues for which he was not at all liable, was not only *ultra vires* but was *mala fide* and illegal, that the plaintiff was never a lessee of the ferry in question and had nothing to do with it, that the process chosen by the Tahsildar as an agent of the defendant, for realizing the aforesaid dues was also unwarranted and without jurisdiction and the Tahsildar had no business to call the plaintiff and to threaten him with taking steps for realization of the aforesaid amount absolutely in violation of law that the plaintiff came to know that the Public Works Department authorities were annoyed with the plaintiff as he had represented the case of Sri Bhagwat Chand to the Superintending Engineer of the Public Works Department and as he had pointed out many irregularities committed by the said Department that as the Public Works Department failed to realize the dues from Sri Bhagwat Chand, hence the local Public Works Department in collusion with Sri Bhagwat Chand wanted to treat the plaintiff as lessee and illegally realize the dues from the plaintiff, that so far as the plaintiff had been able to ascertain the total dues of the Public Works Department on the date of the suit after deducting the security money paid in connection with the contract would not exceed Rs 78 000 and the claim made by the Tahsildar was, in any case, highly excessive and exaggerated that the plaintiff gave a notice under section 80 of the Civil Procedure Code to the defendant on the 5th of may 1951, but no reply was given, that the cause of action for the suit had arisen on the 3rd of May 1951, when the Tahsildar of the Sadar Tahsil demanded Rs 1 08 616 9 from the plaintiff treating the latter as a contractor of the Birdghat ferry in Gorakhpur and on the 6th of July 1951, the date of expiry of the notice

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DEO PRATAG SINGH v. UTTAR PRADESH GOVERNMENT

Gupta J.

The plaintiff prayed for a permanent injuction against the defendant restraining the latter from realizing the Public Works Department dues of the Gorakhpur Birdghat ferry standing in the name of Sri Bhagwat Chand contractor for the period from the 15th of April 1948 to the 14th April, 1951

We have given hereinabove practically the entire plaint as it stands after the amendment which was allowed by the trial court to be made in the plaint

The Uttar Pradesh Government was the defendant impleaded in the suit and they filed a written statement pleading *inter alia*, that the plaintiff had deliberately not disclosed the true facts and had based his claim on totally wrong allegations that as a matter of fact the plaintiff was the real Thekadar of the Birdghat ferry in question which he had acquired *benami* originally in the name of his relation, Sri Kishan Saran Chand and after his death in the name of the deceased s son Sri Bhagwat Chand who, along with a third person named Ram Pearey Kunwar was admitted by the plaintiff into a partnership of the Birdghat ferry business that the plaintiff is a lawyer and resorted to the course of *benami* transactions by utilizing the names of his close relations as lessees only to avoid the formal appearance of his doing business that he was the real Thekedar and was principally in charge of the whole business and actually carried it on in his own interest along with his aforesaid partners all of whom were jointly and severally liable for the dues in respect of the Birdghat ferry lease which were realizable as arrears of land revenue under the Land Revenue Act read with section 9 of the Northern India Ferries Act and therefore the suit was barred by section 233 (*m*) of the Land Revenue Act as it then stood because suits could not be instituted in civil courts with respect to claims connected with or arising out of the collection of land revenue (otherwise than claims under section 183 thereof) on account of the prohibition contained in that section

We may now reproduce the issues that were framed in the case

(1) Whether the suit is barred by section 233 (*m*) of the U P Land Revenue Act?

(2) Whether the suit is barred by section 56 (*d*) of the Specific Relief Act?

(3) Is the plaintiff the real contractor of Bird ghat Ferry and was Sri Kishan Saran Chand a *benamidar* for the plaintiff? If so its effect?

(4) Was there any partnership between Sri Bhagwat Chand Ram Pearey Kunwar and the plaintiff as alleged by the defendant? If so its effect?

(5) Whether the plaintiff has appropriated the benefits of the contract in question and is he liable for the dues in question on this ground?

(6) To what relief if any is the plaintiff entitled?

It appears from the record that it was at first agreed that the disposal of Issue no 1 would necessitate going into facts also and that the whole suit should be tried at one and the same time, but later an application was made on behalf of the defendant that the legal Issue no 1 be decided as a preliminary issue as it related to the jurisdiction of the court to entertain the suit It is in consequence of this application that Issue no 1 was treated as a preliminary issue and was disposed of

The learned Judge of the Court below came to the conclusion that the suit was barred by section 233 (*m*) of the Land Revenue Act

From the issues framed in the case, as quoted above, and the judgment of the court below, it will appear that no issue was framed on the allegations which had been made by the plaintiff that the claim in regard to the ferry dues was *mala fide* and without jurisdiction The importance of these two allegations does not seem to have been present in the mind of the court when the issues were framed and decision was given thereon and the matter was treated as if the bar of section 233 (*m*) of

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the Land Revenue Act was an absolute bar under all circumstances and a suit questioning the demand which had been made against the plaintiff would not lie even if the demand was made *mala fide* or was beyond jurisdiction

When the case was opened before us by Sri *Ambika Prasad*, he contended that section 235 (*m*) of the Land Revenue Act did not stand in the way of his suit having regard to the frame of the plaint and the nature of the allegations made therein and consequently he contended that it was necessary for the court to enquire into the allegations of *mala fides* and examine the question whether the authorities had overstepped their statutory powers

Section 9 of the Northern India Ferries Act, (Act no XVII of 1878) runs as follows

> All arrears due by the lessee of the tolls of public ferry on account of his lease may be recovered from the lessee or his surety (if any) by the Magistrate of the district in which such ferry is situate as if they were arrears of land revenue

The said section 9 is therefore a provision for the recovery of arrears from lessees or from sureties and from no body else Now if arrears are to be recovered from the lessee or his surety if any then alone they can be recovered in accordance with the Land Revenue Act Chapter VIII of the U P Land Revenue Act (Act III of 1901) is the chapter dealing with collection of revenue Section 141 of that Chapter provides that the revenue shall be deemed to be a first charge on a mahal' Section 142 places the responsibility for payment of land revenue on all proprietors jointly and severally Section 143 provides for rules as to payment of revenue arrears and lays down that persons responsible for payment thereof are to be considered as defaulters Section 144 deals with interest Then comes section 145, which runs as follows

> A statement of account certified by the Tahsildar shall, for the purposes of this chapter be conclusive evidence of the existence of the arrear of its amount and of the person who is the defaulter '

Section 146 deals with process of recovery while section 147 provides for a writ of demand to issue and citation to appear Because of the provisions of section 148 the defaulter may be arrested and detained and under section 149 there may be an attachment and sale of movable property There can be an attachment of land also under section 150 Then there are ancillary provisions with which we are not concerned at the moment Then we come to section 183 which runs as follows

> Whenever the proceedings are taken under this chapter against any person for the recovery of any arrear of revenue he may pay the amount claimed under protest to the officer taking such proceedings and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken can sue Provincial Government in the civil court for the amount so paid
>
> and in such suit the plaintiff may notwithstanding anything contained in section 145, give evidence to the amount (if any) which he alleges to be due from him
>
> No protest under this section shall enable the person making the same to sue in the civil court unless it is made at the time of payment in writing and signed by such person or by an agent duly authorized in his behalf

The only other section with which we are at present concerned is section 233 (*m*) which runs as follows

> No person shall institute any suit or other proceeding in the civil court with respect to any of the following matters ,
>
> > (*m*) claims connected with or arising out of the collection of revenue, (other than claims under section 183), or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue

The other sub clauses of this section are not relevant and they relate to other matter in which the cognizance of the civil court is barred

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The documentary evidence filed in this case has not been typed out for us and is not a part of the paper book but it was admitted that in this case there are three communications on the record which are said to be under section 9 of the Northern India Ferries Act and which are addressed by the Additional Collector and District Magistrate to the Tahsildar for taking action in regard to realization of the Bardghat ferry lease dues against the persons named therein We are not determining the legal effect of the aforesaid three communications In the first of these, dated 22nd January, 1951 the person from whom the recovery was to be made is Sri Bhagwati Chand, whereas in the second, dated 1st May 1951, the names given are (1) Sri Bhagwati Chand and (2) Sri Deo Prayag Singh, the present plaintiff, in the third one, dated 20th July 1951, the persons from whom recovery is to be made are (1) Sri Bhagwati Chand, (2) Sri Deo Prayag Singh and (3) Sri Ram Pearey Kunwar A sum of Rs 1 09,137 is indicated in the first communication as being recoverable whereas in the latter two, the amount indicated as realizable is Rs 1,08 616 9 It is because of the issue of these communications and the action of the Tahsildar with reference to them that the suit had been filed and the reliefs contained in the plaint have been sought for the case of the plaintiff being that he is not even a lessee on the face of the lease The view of the court below is that there is only one way of questioning proceedings taken under Chapter VIII of the Land Revenue Act in a civil court and that is by having recourse to section 183 of the Act Save and except this, there is said to be an absolute bar placed on the filing of a suit because of section 233 (*m*) of the Act Inasmuch as proceedings were purported to be taken under Chapter VIII of the Land Revenue Act and the suit was clearly not one of the type provided in section 183, the court below held that it could not be entertained and dismissed it

Two Full Bench cases were cited before the learned Judge in the court below and he has dealt with them

One is the case of *Daya Ram* v *Secretary of State* (1) which was relied upon by the court below The other is the case of *Radha Kishan* v *Ram Nagar Co operative Society* (2), which the court below considered was distinguishable from the facts of the instant case and was not applicable These cases concern recovery of dues as arrears of land revenue

In *Daya Ram s* case (1) the process for recovery of dues was issued against the plaintiff himself on the ground that the amount was due from his predecessor in interest The plaintiff paid the amount under protest under section 185 of the Land Revenue Act and then brought a suit for recovery of the amount and also for damages An objection was taken to the maintainability of the defaulter, the defaulter being his predecessor in interest and it was urged that section 185 would, therefore not apply The objection was overruled in second appeal by this Court and the suit was decreed with respect to the amount that the plaintiff had paid under protest The plaintiff s claim for damages was, however dismissed on the ground that the Crown was not liable to pay compensation for the illegal acts of its servants but was bound to make restitution to the extent it had benefited by the illegal acts We may note that the first two courts had dismissed the suit

It was contended before us that the court below was wrong in relying upon this case because it was urged that whatever proceedings could be said to have been taken against the plaintiff were against a person who could not be considered to be a defaulter or to have been declared a defaulter within the meaning of the two Acts referred to already and so the provisions of Chapter VIII of the Land Revenue Act were not applicable Secondly, it was urged that there had been no payment under protest as is required under section 185 of the Land Revenue Act and, thirdly, it was contended that no question of *mala fides* was raised in *Daya Ram s* case (1) nor was any question raised in that case

(1) A I R 1927 All 672 (2) A I R 1951 All 341

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that there was an exercise of power beyond jurisdiction and it was urged, therefore, that the case was not applicable

Learned counsel for the appellant on the other hand relied upon *Radha Kishan's* case (1) for the proposition that section 233 (*m*) of the Land Revenue Act should not be so interpreted as to exclude a suit in a civil court filed by a party to prove his claim that the property proceeded against belonged to him and not to the defaulter against whom revenue might be due

In reply, it was contended that in *Radha Kishan's* case (1), Radha Kishan was not named as the defaulter, but it was Phool Chand who was so named and further that the facts of *Radha Kishan's* case (1) were that some property of Phool Chand was said to be in possession of Radha Kishan and was being sought to be attached and sold as the property of Phool Chand It was said that it was in those circumstances that Radha Kishan brought the suit and the Full Bench held that his claim was not barred by section 233 (*m*) If the contention of learned counsel for the appellant that merely because communications as stated above were issued by the Additional District Magistrate to the Tahsildar that would not amount to his being named as a defaulter in accordance with the provisions of the Act is correct then *Radha Kishan's* case (1) might be attracted We do not wish to express ourselves further in regard to these two cases which have been cited before us because we are sending back the case for a retrial after setting aside the judgment and we think that the question whether *Radha Kishan's case* (1) or *Daya Ram's* case (2) would apply to the facts of the present case should be determined after the facts have been properly ascertained but we may point out that even in *Radha Kishan's* case (1) the question has been considered as to whether a suit would lie in case there was an allegation of *mala fides* or if it had been alleged that the authorities had acted beyond jurisdiction

We now come to consider whether if there is allegation of *mala fides* and an allegation that the authorities have

(1) A I R 1951 All. 341 (2) A I R. 1927 All 673

acted beyond jurisdiction in such circumstances a plaintiff can or cannot file a civil suit or whether he is still debarred from doing so because of section 233 (m) of the Land Revenue Act and whether his remedy in such a case is limited to the type of suit which can be filed under section 183 of the Land Revenue Act

On the question of the right of suit despite a prohibition in the statute where *mala fides* are clearly alleged we would like to refer to the case of *Thin Yick* v *Secretary of State for India in Council* (1) In that case it was recognized that had there been a charge of *mala fides*, then despite the fact that the jurisdiction of the civil court had been ousted by the Sea Customs Act, 1878 a suit could be entertained Reference was made in that case to the judgment of *Court Trotter*, J, in *Best & Co Ltd* v *Collector of Madras* (2) In that last mentioned case section 106 (2) of the Government of India Act was set up as a bar to the suit The Court held that that section was a bar but pointed out that if there had been an allegation that the Secretary of State had acted *mala fide* or had purported to seek the protection of the statute with the full knowledge that what was being done was to commit a mere act of aggression the suit would not be barred

In *Lady Dinbai Dinshaw Petit* v *The Dominion of India* (3), which was cited before us, the plaintiffs had alleged *mala fides* and attacked certain orders made by the Collector of Bombay on the ground of these having been made for a collateral purpose A statutory bar to the suit was pleaded but it was not accepted because it was held that on the facts alleged and if those facts were proved it would not be a case of irregular exercise of power of jurisdiction but an exercise of power which the requisitioning authority did not possess

In that case, there was also a discussion as to what are the requirements of pleadings when the challenge is on the ground of *mala fides* and it was stated that *mala fides* were a contention of the mind and it was impossible to expect a party to give particular of some

(1) I L R (1939) 1 Cal 257 268 (2) A I R 1919 Mad 715 716
(3) A I R 1951 Bom 72

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thing which is subjective as far as the other party is concerned. A distinction was drawn between Order VI, rule 10, and Order VI, rule 4 of the Civil Procedure Code. We mention this because it was said that there were no particulars of *mala fides*, which does not moreover appear to be so. Obviously therefore the *Petti* case (1) has held that if there is an allegation of *mala fides* despite statutory exclusion, the civil court would still have a jurisdiction to entertain the suit.

We would now like to refer to the case of the *Secretary of State for India represented by the Collector of South Arcot* v. *Mask & Co.* (2), which is a Privy Council case. In that case, the facts were that the Assistant Collector of Customs assessed betel nuts imported by the respondents as boiled betel nuts. The respondents claim that betel nuts should have been classed as raw sheed betel nuts and assessed to a lower duty. They deposited the amount of the higher duty and appealed to the Collector of Customs, and the Collector having decided against them, they applied to the Government of India for a revision of the Collector's decision. The Government of India affirmed the Collector's decision. The respondents then instituted the suit in the court of the subordinate judge of Cuddalore for a refund of the difference between the higher duty levied and the lower duty which they claimed was the one properly leviable. The Subordinate Judge held that he had no jurisdiction and dismissed the suit. The High Court reversed his finding and remitted the suit for trial on the merits. Then there was an appeal to their Lordships of the Privy Council and the question raised before their Lordships of the Privy Council was whether the jurisdiction of the civil court was completely ousted by the Sea Customs Act in the matters provided for in the Act and whether the procedure under the said Act was alternative excluding resort to the civil court when one had elected to adopt it. It was observed by Lord THANKERTON as follows:

> It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act

(1) A. I. R. 1953 Bom. 72 (2) I. L. R. [1940] Mad. 589

> have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure

Their Lordships expressed the opinion that in that case the jurisdiction of the civil court was excluded by the order of the Collector of Customs on appeal under section 188 and it was unnecessary to consider whether prior to taking such appeal under section 188 respondents would be entitled to resort to a civil court or whether they would be confined to a right of appeal under section 188 Therefore their view was that the jurisdiction of the civil court was, on the facts established and the statutory provisions applicable excluded in the particular case and consequently they allowed the appeal and restored the order of the Subordinate Judge but nonetheless the observations of their Lordships of the Privy Council as quoted above would apply in an appropriate case which fell within the benefit of the rule laid down This case of the *Secretary of State for India* v *Mask & Co* (1) has been followed at least in three cases of this Court namely, *Dr Brij Behari Lal* v *Emperor* (2) *Allah Tala* v *District Board of Pilibhit,* (3) and *District Board of Farrukhabad* v *Prag Dutt* (4)

In *Firm Ralla Ram Raj Kumar* v *Union of India* (5) it has been laid down that

> The exclusion of the jurisdiction of the civil courts is not to be readily inferred but must either be explicitly expressed or clearly implied Even if jurisdiction is so excluded the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in confirmity with the fundamental principals of judicial procedure '

The Punjab case mentioned above was a case under the Land Revenue Act The Court further held that the Land Revenue Act expressly and impliedly barred

(1) I L R [1940] Mad 599 (2) A I R 1943 All 122
(3) A I R 1945 All 273 (4) I L R [1949] All 26
(5) A I R 1952 Punj 340

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Gurtu, J

matters concerning the collection of land revenue where the property from which the land revenue is to be had *ex facie*, belonged to the defaulter but there is no express or implied bar of such a nature regarding property which *ex facie*, belonged to some body else

Where therefore, in pursuance of a certificate under section 46(2) Income Tax Act, forwarded to him, the Collector attached the properties of a firm which there upon brought a suit contesting the liability of the properties for attachment and sale on the ground that the assessee in respect of whom the certificate was issued was not a partner, it was held that the civil courts had jurisdiction to entertain the suit

It seems to us upon a review of the cases mentioned above and other authorities, which we do not think it necessary now to mention, that if there is a clear allegation of lack of power or of *mala fide* exercise of power, then the statutory provisions of exclusion of the jurisdiction of a civil court would not bar such jurisdiction We, therefore, feel that, in this case we should and do hereby set aside the judgment and decree of the court below and vacate all findings given by that court and order that the case should go back to the trial court for disposal of all the issues including the issue which has already been disposed of in the light of all the proved facts and circumstances as also the statutory and case law and our observations We are of opinion that all the issues in the case should be answered by the court below after a full trial We order accordingly

In view of what we have stated above, it would be necessary for the court below to decide two further issues, which we have framed in order that there may be no doubt in the minds of the parties as to the points whereon they are at issue These issues are as follows

(1) Whether the orders passed and the action taken by the authorities concerned against the plaintiff were *mala fide*?

(2) Whether the order passed and action taken by the authorities concerned were within and in accordance with the powers conferred by the relevant statutes?

We might add that parties were agreed that, in case we decided to send the case back to the trial court, all the issues should be disposed of by it afresh Parties are further agreed that fresh opportunity should be given to them for filing any documentary evidence that they desire Since the oral evidence has not yet been recorded, it is not necessary to pass any orders in respect thereof We order accordingly

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The appeal is therefore allowed and disposed of in terms of the above order The trial court shall now proceed to dispose of the suit in accordance with law and the directions given herein before Costs here and hitherto will abide the result

Appeal allowed

APPELLATE CIVIL

Before Mr Justice Gurtu and Mr Justice Dwivedi

1959

August 25

THE BHARAT VEGETABLE PRODUCTS LIMITED AND OTHERS (DEFENDANTS)

v

RAM DAS AND ANOTHER (PLAINTIFFS)

Arbitration Agreement—*Suit in respect of matter covered by—Application for stay of—Unauthorized application for adjournment and application for setting aside ex parte order whether steps in suit—Arbitration Act,* 1940 *s* 34

Neither an application for adjournment filed by a Pleader without authority and dismissed as such nor an application praying for and securing the setting aside of an order for proceeding with the suit *ex parte* can be said to be a step in the proceeding so as to deprive the applicant of the benefit of s 34 of the Arbitration Act for the stay of the suit relating to a matter agreed upon by the parties to be decided through arbitration

Charan Singh and Sons v *Harbhajan Singh Hardit Singh* (1) adopted *Lane* v *Herman* (2) relied on

First Appeal From Order No 150 of 1954 from an order of Raja Ram Rastogi, Civil Judge of Bareilly, dated the 24th April, 1954

The facts appear in the judgment

(1) A I R 1952 Punj 109 (2) (1939) 3 A E R 353 356,

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DWIVEDI J

Ambika Prasad for the appellants

Brij Lal Gupta for the respondents

The judgment of the Court was delivered by—

DWIVEDI J —The defendant appellants filed this appeal against the order of the trial court refusing to stay further proceedings in the application for permission to sue as a pauper under section 34 of the Indian Arbitration Act 1940 The circumstances, which have given rise to this appeal are as follows

The plaintiff respondents filed an application for permission to sue as pauper on the 2nd of November 1953 The relief claimed in the application was that a decree for Rs 36,285 should be awarded to the plaintiffs against the defendants Notices of the application for permission to sue as a pauper were issued to the defendants requiring them to file objections against the application On 30th January 1954, Sri Madan Mohan Bhatnagar, Vakil filed an application praying for time to file objections A telegram from the defendants was also attached along with the application The telegram requested the aforesaid Vakil to apply for adjournment to the court The application was, however, filed without a Vakalatnama from the defendants, and since the application was not properly presented, the trial court refused to adjourn the case and passed an order that the case should proceed *ex parte* against the defendants On 22nd February, 1954 the defendants filed an application supported by an affidavit praying for the setting aside of the *ex parte* order and filing of an objection to the application for permission to sue as a pauper

The trial court set aside the *ex parte* order on that date and fixed the 30th of March 1954, for filing an objection by the defendants On 30th March, 1954, the defendants filed an objection under section 34 of the Indian Arbitration Act It was stated in that application that the plaintiffs and the defendants had entered into an agreement in respect of the subject matter of the pauper application and clause 23 of that agreement required the parties to settle their dispute by arbitration It was said that since the dispute in the case arose out

of the aforesaid agreement the court could not proceed with the matter because the defendants were always ready and willing to submit the dispute to arbitration and section 34 of the aforesaid Act in such circumstances required that the court should stay further proceedings until the dispute was decided by the arbitrators

Two objections were raised on behalf of the plaintiffs to the defendants application under section 34 of the Indian Arbitration Act The first objection was that the plaintiffs have already challenged the validity of the abovementioned agreement under section 33 of the said Act and that question was still under consideration of the court in a separate proceeding The trial court accepted this objection, but it has not been pressed before us by learned counsel for the plaintiffs, and it will be deemed that the point has been given up in the appeal

The second objection to the defendants application was that since the defendants had already taken steps in the proceedings section 34 of the Indian Arbitration Act was not applicable to the case and the court could not stay further proceedings It was said that on the 30th of January 1954, an application for adjourning the case was made by Sri Madan Mohan Bhatnagar, Vakil of the defendants But that application was filed by Sri Madan Mohan Bhatnagar without any Vakalatnama or any other authority from the defendants The true legal position on that date therefore was that Sri Madan Mohan Bhatnagar had no power or authority to present the application and the said application was accordingly not an application on behalf of the defendants in the eye of law The defendants cannot be held to have taken any steps in the proceeding on account of the mere fact that Sri Madan Mohan Bhatnagar had made that application on 30th January, 1954 Indeed, the trial court did not consider that application at all and rejected it as defective and incompetent

It was then submitted that the defendants moved on the 20th of February, 1954, an application supported by an affidavit for the setting aside of the *ex parte* order,

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dated the 30th of January 1954 and for the filing of an objection to the pauper application and thereby took steps in the proceedings. The trial court accepted this submission and dismissed the defendants' objection under section 34 of the Indian Arbitration Act.

We have carefully perused the application and the affidavit dated the 20th of February 1954, and we are of opinion that the defendants by moving that application cannot be said to have taken a step in the proceedings. As already stated on 30th January 1954 the trial court had passed an order that the case would proceed *ex parte* against the defendants and the defendants could not possibly take any part in further proceedings until the *ex parte* order was set aside. The defendants were in the circumstances obliged to apply to the court for the setting aside of the *ex parte* order, and their application dated the 20th February, 1954 contained the following prayer:

> It is therefore respectfully prayed that the *ex parte* order dated 30th January 1954 be set aside and the defendants be given opportunity to file objections and contest the application and for this the defendants shall ever pray.

The trial court set aside the *ex parte* order as prayed and fixed the 30th of March 1954 for the filing of an objection and on that date the defendants filed an objection under section 34 of the Indian Arbitration Act for stay of proceedings. No other step was taken by the defendants in the proceeding and it seems to us that their real intention in making the application dated 20th February 1954 was to remove the impediment of the *ex parte* order from their way and then to file an objection under section 34 of the Indian Arbitration Act.

The words "the defendants be given opportunity to file objections and contest the application" in the prayer in that application should in the circumstances mentioned above be construed to refer to an objection and a contest under section 34 of the Indian Arbitration Act. It may be conceded that those words

are equivocal and may also import when insulated from then setting an intention to abandon the arbitral forum and submit to the judicial forum and contest the plaintiff's application by raising objections permissible under Order XXXIII of the Code of Civil Procedure But this is not a legitimate method of ascertaining a person's intention from a document When the words in a document suffer from equivocation it is the duty of the court to X ray them with the aid of their entire background and thus discover the true and real intention of the writer So examined the aforesaid words evince one and only one intention that the defendants wanted an opportunity after the setting aside of the *ex parte* order to move the court to stay its hands so that the dispute could be resolved by arbitration Their application dated the 20th of February, 1954 was indeed a foreshadow of their objection under section 34 of the Indian Arbitration Act and nothing more

Considering all the facts and circumstances of the case we have no doubts that the defendants, by filing the application dated the 20th of February 1954, did not take any step in the proceeding within the meaning of that expression in section 34 of the Indian Arbitration Act

We are supported in our view by a decision of the Punjab High Court in *Messrs Charan Dass and Sons v Messrs Harbhajan Singh Hardit Singh* (1) In that case also an *ex parte* order was passed against the defendants The defendants applied for the setting aside of the *ex parte* order and after the *ex parte* order had been set aside they made an application under section 34 of the Indian Arbitration Act for the stay of further proceedings in the case It was thereupon contended on behalf of the plaintiffs that the defendants had already taken a step in the proceeding by applying for setting aside the *ex parte* order The contention was rejected and it was held that since the defendants were obliged to apply for the setting aside of the *ex parte* order it could not be said that they had taken any step in the proceeding It was observed that if, after the setting aside of the

(1) A I R 1952 Punj 109.

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ex parte order, the defendants had taken any other step in the suit besides the step of asking the court to stay proceedings because of the arbitration clause in the agreement then no doubt they could not avail of the benefit of section 34 of the Indian Arbitration Act but the defendants had not taken any step except the application for setting aside the *ex parte* order and, therefore it was held that the defendants could get the benefit of section 34 of the Indian Arbitration Act

In the case before us also defendants did not take any intermediate step between the date of the setting aside of the *ex parte* order and the making of the application under section 34 of the Indian Arbitration Act The observations of DU PARCQ, L. J., in *Lane* v. *Herman* (1), would also inferentially lend support to the view we are taking in this case

We may also mention here that learned counsel for the defendants addressed an argument to us that at the time when the defendants had applied for the setting aside of the *ex parte* order, the application to sue as pauper was under consideration and no suit was then pending before the trial court, so that it could not be said that the defendants had taken a step in a proceeding in respect of any matter agreed to be referred to arbitration Since it has been possible for us to dispose of the case on a narrower ground we have not considered it proper to express any opinion on this question

We accordingly allow this appeal and set aside the order of the trial court and further direct that the trial court will now proceed to pass an appropriate order under section 34 of the Indian Arbitration Act having regard to the observations made by us as well as other circumstances which may be placed before it for consideration The plaintiffs shall pay the costs of this appeal to the defendants

Let the record of the case be sent down to the court below as early as possible

Appeal allowed

(1) (1939) 3 A. E. R. 353,356.

APPELLATE CIVIL

1959

August 28

Before Mr Justice Gurtu and Mr Justice Dwivedi

U P GOVERNMENT (DEFENDANT)

v

NANHOO MAL GUPTA (PLAINTIFF)

Agreement to lease—*in contemplation of expiry of existing term—Sitting tenants wrongful refusal to vacate—Agreement, whether suffers from a common mistake of fact—Commencement of lease—Not expressly stated but ascertainable other wise—Agreement whether bad for uncertainty—Indian Contract Act, 1872 ss 20 and 29*

An agreement for lease on the assumption or belief of both the parties that the sitting tenants would vacate the premises after the expiry of their term cannot in case of their wrongful refusal to vacate be said to be based on a common mistake of fact so as to be rendered void by s 20 of the Contract Act

A lease for a term the commencement of which is not expressly stated but is nevertheless ascertainable from the recitals in the deed or other circumstances cannot be said to suffer from uncertainty so as to be void under s 29 of the Contract Act

Wisley v *Walker* (1) and *Sandill* v *Franklin* (2) relied on

(B) Agreement to lease—*Whether and when compulsorily registrable—Effect of non registration—Indian Registration Act, 1908, ss 2 (7) 17 (1) (d) and 49*

S 17 (1) (*d*) read with s 2 (7) of the Registration Act makes a lease as well an agreement to a lease of immovable property from year to year or for a term exceeding one year compulsorily registrable The expression agreement to lease however covers only such agreements as create a present demise

Where a document fixes all the essential terms of a lease and would be effective without the necessity or assistance of another or further agreement or document to be executed in future it creates a present demise notwithstanding the fact that it is to take effect on possession obtainable at a future date Such a document, if unregistered is neither valid nor admissible in evidence

Trivenibai v *Srimati Lilabai* (3) and *Chapman* v *Tanner* (4) applied

(C) *Contracts by the Union or a State—How to be executed and expressed—Non compliance with requisite forms, effect of—Government of India Act, 1935 [26 Geo 5 Ch (2)] s 175 (3)—Constitution of India Art 299 (1)*

(1) 38 L T (N S) 284 (2) (1874) L R 10 C P 377
(3) A I R 1959 S C 620 (4) (1860) 6 M & W 100

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The constitutional requirement is that all contracts by the Union or a State shall be expressed to be made by the President or the Governor as the case may be A contract which does not conform to the prescribed mode though not void is unenforceable against the Government unless it chooses to ratify and be bound by it

Bigiol v State of U P (1) *Chelumbhai Vithaldas v Moveshai Fakirchand* (2) *Thawardas Fateumal v Union of India* (3) and *Ghosh Singh Pasricha v Union of India* (4) relied on

(D) *Suit on contract against Government—Notice for—Scope—Objection as to unenforceability of contract whether and when may be raised for the first time in High Court—Code of Civil Procedure 1908 O XLI r 2 s 80*

An objection on a point of law which does not involve or depend on question of fact may be allowed to be raised for the first time at the stage of arguments in appeal before the High Court

The objection to the enforceability of a contract subject to the plea of lack of ratification cannot therefore be allowed to be raised for the first time in appeal unless the plea is not at all available to the other party as for instance where there notice served on the Government under s 80 of the Code of Civil Procedure—which is strictly construed and fixes the scope of the prospective suit—does not mention or rely on ratification

Meenemy v The Secretary of State for India (5) *Province of Madras v R B Poddar* (6) *Keshardal Lalbhai Patel v Lalbhai Trikumal Mills Ltd* (7) and *Ramjoy Madaki v Durga Charan* (8) relied on

Kalyanpur Lime Works Ltd v The State of Bihar (9) distinguished

First Appeal No 316 of 1946 from a decree of J K Dar Civil and Sessions Judge Kanpur, dated 26th April 1946 in Suit No 79 of 1945

The facts appear in the judgment

Brij Lal Gupta for the appellant

Ambika Prasad, S S Chandwaria and *V K Burman* for the respondent

The judgment of the Court was delivered by—

DWIVEDI J —The U P Government, the defendant appeals The dispute in this case relates to four plots

(1) A I R 1954 All 393
(2) A I R 1954 S C 236
(3) A I R 1955 S C 468
(4) A I R 1959 Cal 287
(5) (1911) I L R 38 Cal 797
(6) A I R 1949 Mad 214
(7) A I R 1959 S C 512
(8) A I R 1929 Cal 830
(9) A I R 1954 S C 165

of land situate in the city of Kanpur They are mentioned in Schedule A to the written statement filed on behalf of the defendant Markets are held on these plots The plaintiff filed a suit against the defendant for damages for a breach of an agreement to let out those plots to him The allegations in the plaint were that in August 1944 the Executive Engineer Kanpur Division (Lower Ganges Canal) who was in charge of the management of the aforesaid plots invited offers for the grant of a lease of the aforesaid plots that the plaintiff's offer being the high st was accepted by the Executive Engineer Sri Shyam Lal on behalf of the defendant that it was settled between the plaintiff and the Executive Engineer that the plaintiff would be granted the lease of the aforesaid plots for a period of five years, that the plaintiff was asked to deposit Rs 6 126 as six months rent in advance that the plaintiff accordingly deposited Rs 6 000 on the 25th August 1944 and Rs 126 on the 6th September 1944 that on the 26th August 1944 the plaintiff and the Executive Engineer signed certain documents which according to the plaintiff, were agreements to lease, and that the plaintiff was assured that he would be let in possession over the aforesaid plots as soon as the sitting tenants vacated them or in any case on the 1st April 1945 when the term of their leases was to expire The Executive Engineer however did not deliver possession of the aforesaid plots in spite of repeated requests of the plaintiff On the 25th February 1945 the plaintiff was informed by Sri B D Goyal the then Executive Engineer that the plaintiff's deposit money of Rs 6 126 was being returned to him because it was not possible to deliver possession of the aforesaid lands to him After some intermediate correspondence the plaintiff served on the 19th 25rd June 1945 a notice under section 80 of the Code of Civil Procedure on the defendant through the Collector Kanpur It was pointed out in the notice that if the Government failed to honour the contract and deliver possession of the aforesaid plots to the plaintiff the plaintiff would institute a suit in the appropriate civil court for the specific performance of the contract or for recovery of damages The defendant failed to deliver

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possession of the aforesaid lands to the plaintiff and hence the suit. The plaintiff claimed Rs 15,000 as damages for breach of contract.

In the written statement filed on behalf of the defendant it is admitted that Sri Shyam Lal, Executive Engineer, accepted the offer of the plaintiff and agreed to give him a lease of the aforesaid plots for a period of five years. It was, however, alleged that the plaintiff had executed four leases in respect of the aforesaid plots on the 26th August 1944 but the plaintiff did not get them registered as required by law. The leases were accordingly void and unenforceable against the defendant. It was further alleged that the leases were void for mutual mistake of fact. It was also stated that the Executive Engineer had no authority to grant the leases. No sanction was obtained from proper authority by the Executive Engineer and the leases were not executed in accordance with legal procedure. Lastly, it was alleged that the plaintiff was not entitled to any damages and, at any rate, the damages claimed were very excessive.

The evidence consists of some documents and the oral statements of the plaintiff and one Deep Chand on behalf of the defendant. We shall deal with the evidence at the appropriate stage hereafter.

The trial court repelled all the pleas of the defendant and held that it was liable to pay a sum of Rs 13,200 as damages to the plaintiff for the non performance of the agreement to lease the aforesaid plots. It has further directed that if during the period of five years during which time the leases of the plaintiff would have remained in force plots nos 1 and 3 would be required and retained by the defendant for its own use, the defendant would be entitled to claim a refund of the proportionate amount of damages which had been allowed to the plaintiff. As already stated, the defendant appeals against the judgment and decree of the trial court.

The plaintiff has filed a cross objection against that part of the decree which entitles the defendant to claim a refund of the proportionate amount of damages in a certain contingency. It may be stated here that learned

counsel for the plaintiff has not pressed his cross objection during the hearing of the appeal so that nothing need be said in our judgment about the merits of the cross objection

The memorandum of appeal filed on behalf of the defendant covers a very wide area Learned Junior Standing Counsel has, however confined his challenge to the decree of the trial court to only four grounds They are

(1) The four leases which were executed on the 26th August, 1944 are void under section 20 of the Indian Contract Act on account of mutual mistake of fact

(2) The said leases do not specify the date from which their term would commence and are therefore void for uncertainty

(3) The term of the said leases is a period of five years and since the plaintiff did not get them registered no liability can be fastened upon the defendant on the strength of those leases

(4) No damages could be granted to the plaintiff

Since learned counsel for the defendant has not pressed the other grounds mentioned in the memorandum of appeal it will not be necessary for us to deal with them and we shall now proceed to examine the above said four grounds in their serial order

The plea regarding mutual mistake of fact was taken in paragraphs 4 and 17 of the defendant's written statement It was said there that the leases were executed under a mutual mistake of the parties that possession of the plots in dispute would be given immediately or in 15 days by evicting the sitting tenants Since the sitting tenants refused to vacate it became impossible for the defendant to perform its part of the contract Learned Junior Standing Counsel has invited our attention to the application (Ex P) of the plaintiff dated the 23rd August 1944 By this application the plaintiff intimated to the Executive Engineer that he had come to know that the term of the lease of the aforesaid plots in favour of the sitting tenants had

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expired and that he was, therefore, making an offer to accept leases on enhanced rates of rent. The application ended with the request that his offer being a substantial offer, should be accepted. On the foot of that application the Executive Engineer passed an order on the 26th August, 1944, in these terms:

> As this is 50 per cent increase over present rates hence sanctioned from the date of giving over possession to him.

It is argued that if the application and the order of the Executive Engineer are read together it would appear that the leases were granted to the plaintiff on the assumption that the sitting tenants would vacate the land. Notices were issued to the sitting tenants by the Executive Engineer on the 25th August, 1944, to vacate the disputed plots within 15 days. But the sitting tenants did not vacate the plots and, in spite of his best efforts, the Executive Engineer could not deliver possession of the disputed plots to the plaintiff on account of the unwillingness of the sitting tenants to vacate the plots. It was urged that the aforesaid documents clearly revealed that the contracting parties had wrongly assumed that the sitting tenants would vacate the plots when required by the Executive Engineer to do so. The erroneous assumption of the parties amounted to a mutual mistake of fact and the leases were therefore, void under section 20 of the Indian Contract Act.

Before examining the merits of the arguments of learned Junior Standing Counsel on this point we would like to point out that the written statement has inaccurately used the expression mutual mistake. Mistakes in the formation of contracts may be of three kinds namely unilateral mistake, mutual mistake and common mistake. In a case of unilateral mistake only one of the contracting parties is mistaken and the other knows of his mistake. Its consequence is that the contract is void. In a case of mutual mistake the contracting parties misunderstand each other and there is no real correspondence of offer and acceptance. The parties are really not consensus *ad idem* and there is in fact no agreement at all. In this case also the contract

is void In a case of common mistake both the contracting parties make the same mistake The minds of the contracting parties are *ad idem* and there comes into being an agreement but it is devoid of force and efficacy because both the parties are mistaken about some fact which is vital to the agreement Section 20 of the Indian Contract Act deals with the common mistake of fact and not mutual mistake of fact The facts averred in paragraphs 4 and 17 of the written statement clearly suggest that the expression mutual mistake has wrongly been used for common mistake We would accordingly proceed on the basis that we are called upon to decide whether the agreements in the instant case were void on account of a common mistake of fact committed by the contracting parties at the time of the formation of the contract

At the time of the formation of the contract the subject matter of the contract was in existence The plots in dispute were there and the leases of the sitting tenants were to expire on the 31st March, 1945 One of the covenants in the leases of the sitting tenant was that they would vacate the plots within 15 days from the date of the receipt of a notice from the lessor that they should hand over possession of the plots to the lessor The plaintiff and the Executive Engineer were aware of this covenant and both of them expected that the sitting tenants would honour the covenant and vacate the plots when they were called upon to do so by the Executive Engineer So far it cannot be said that the parties were negotiating under a common error as to an essential fact The pith and substance of the defendant s grievance really is that the sitting tenants belied the expectation of the contracting parties that they would vacate the plots in conformity with the covenant in their leases But a contract is not necessarily void because subsequent events have disappointed the expectation of the parties in which it was made Section 20 does not apply to a case where the contracting parties have made no mistake as to any fact existing at the time of the making of the contract and it is complained that one of them is unable to carry out its part of the contract on account of the

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unexpected refusal of a third person to carry out his obligation under another agreement The first contention of learned Junior Standing Counsel therefore fails

The next argument of learned Junior Standing Counsel is that four leases in the instant case do not specify the dates from which they would commence The leases are therefore void for uncertainty The four leases are marked Exs F G H and I In all these leases it is expressly stated that they were to run for a period of five years from 1944 to 1949 but the space where the date of the commencement of the lease should have been mentioned is left blank It is no doubt true that section 93 of the Indian Evidence Act forbids the filling in of blanks in a deed with the aid of extrinsic evidence but it does not affect the courts power to fill in blanks and omissions by the ordinary rules of construction of deeds We would therefore, examine the documents marked Exs F, G, H and I for the purpose of ascertaining whether the date of the commencement of the leases had been settled definitely between the plaintiff and the defendant At the very beginning of those documents the term and the rent of the tenancy have been stated plainly It is then mentioned where and how the rent would be paid to the lessee There is a clear stipulation between the parties that the plaintiff would pay six monthly rent in advance at the office of the Executive Engineer or to any such officer as is nominated by him for this purpose Then it is provided that the first instalment of rent would be paid on 28th August, 1944 When the term and the rent of the tenancy were determined, and the rent was made payable in advance half yearly the payment commencing from 28th August 1944 it appears to us that the term commenced on the same date Rent may be paid in advance or when it has become due but as a rule a person would not agree to pay any sum as rent until the lease has actually commenced to run its course The agreement that the rent should be paid on 28th August 1944, would, therefore, import that the term of the lease started

to run from that date, and the documents aforesaid can not be said to be uncertain and incomplete In *Wisley v Walker*, (1) the defendant was the owner of a piece of land On 10th February, 1877 he signed in favour of the plaintiff a memorandum to the effect that he would let the land for a term of 99 years at 20£ yearly rent which would be payable quarterly commencing on 25th March next The plaintiff's suit for specific performance of the agreement was resisted by the defendant on the ground that the agreement was uncertain because the commencement of the term was not fixed on the face of it FRY, J while rejecting the submission observed

> But the term for 99 years is accompanied by rent which is clearly payable quarterly during the term, which rent commences on 25th March 1877, and it appears to me therefore that the term commences at the same period

The decision in *Sandill v Franklin* (2) is also to the same effect and supports our conclusion The second contention of learned Junior Standing Counsel, therefore, also fails

Learned Junior Standing Counsel then contended that the leases were for a period of more than one year A lease for a period of more than one year can be executed by a registered instrument only Since the leases in question were not registered, they were unenforceable against the defendant and the plaintiff's suit for damages was, therefore liable to be dismissed

The trial court has held that the documents Exs F, G H and I were neither leases, nor agreements to lease within the meaning of that term in the Indian Registration Act The said documents in the opinion of the trial court, merely evidenced an agreement whereby the plaintiff and the Executive Engineer had stipulated that the latter would execute a lease at some future date in favour of the plaintiff in respect of the disputed plots The trial court therefore held that the said documents did not require registration

(1) 38 L T (n s) 284 (2) (1874) L R 10 C P 377

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Learned counsel for the plaintiff has reiterated before us the argument that the aforesaid documents evidenced neither a lease, nor an agreement to lease as defined by the Indian Registration Act. They are merely agreements whereby the Executive Engineer bound himself to let out the disputed plots to the plaintiff by executing proper leases at some future date. A lease is a present and immediate transfer of lessee's rights in the demised property to the lessee. Section 2 (7) of the Indian Registration Act provides that a lease includes an agreement to lease. Section 17 (1) (d) of the Indian Registration Act enjoins that a lease as well as an agreement to lease should be registered. In the case of *Trivenibai v. Smt. Lilaba* (1) their Lordships of the Supreme Court have held that an agreement to lease is a document which creates a present demise. In other words an agreement between the two parties, which entitles one of them merely to claim the execution of a lease from the other without affecting a present and immediate demise in his favour, is not an agreement to lease, and such an agreement would therefore not require registration under the Indian Registration Act. We will therefore have to see whether the documents, Exs. F, G, H and I affected a present and immediate demise of lessee's rights in favour of the plaintiff, or they merely entitled the plaintiff to claim the execution of leases from the Executive Engineer without affecting an actual demise in his favour.

All the four documents are headed as lease. They are signed by the plaintiff and Sri Shyam Lal, the then Executive Engineer. In the preamble of all the documents it is categorically stated that the plaintiff has acquired a plot of land for the period beginning from 1944 and ending with 1949 at the rate of Rs. 21 per month on the conditions specified in the deed. The word acquired, in our view, is indicative of the fact that the documents affected an actual demise in favour of the plaintiff. Condition (17) of the document (Ex. F) recites that it was agreed that if any tax of any sort were imposed on the aforesaid land, *which has been*

(1) A.I.R. 1959 S.C. 620

given on *rent*, the lessee would be liable for the payment of such tax The words which has been given on rent again indicate that the document affected a present and immediate demise of lessee s rights in favour of the plaintiff Condition (31) in the documents Exs G and H declared that the leases which had been executed under any circumstances prior to the execution of these documents would be deemed to be cancelled and annulled Condition (31) also shows that these documents effected a present and immediate demise of lessee s rights in favour of the plaintiff for otherwise it would not have been necessary to make the declaration that the leases existing at the time of the genesis of these documents would be annulled or cancelled Those leases were to expire on the 31st March 1945 If the intention of the plaintiff and the Executive Engineer were that the plaintiff was being given a right to get leases executed at some future date it would not have been necessary to make the declaration that the existing leases would be deemed to have been annulled or cancelled Such a declaration was necessary only because the parties intended to affect a present and immediate demise in favour of the plaintiff Further the documents in question have also fixed all the essential terms of a lease They have fixed the rent and the mode of its payment They have fixed the duration of the leases and they have also further fixed the covenants regulating the relationship of lessor and lessee

It was held in the case of *Chapman* v *Towner* (1) that if a document has fixed all the essential terms of a lease it should be construed as a lease The mere fact that the plaintiff was not actually put in possession on or after the execution of these documents would not affect their intrinsic character Where the property, which is the subject matter of demise is in possession of a sitting tenant or a trespasser, undoubtedly possession cannot be immediately taken over by the prospective lessee but the lease would nonetheless be a lease if the executants of the document intended to effect a present and immediate transfer of lessee s rights

(1) 6M & W 100

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We are therefore of opinion that the documents in question evidenced a lease in favour of the plaintiff and were consequently compulsorily registrable Since these documents are unregistered they are incapable of creating any right in favour of the plaintiff and they do not bind the defendant The defendant cannot be made liable for breach of any term of these leases These documents are also inadmissible in evidence on account of section 49 of the Indian Registration Act, because they are not registered instruments

Learned counsel for the plaintiff however contends that he can fall back upon the agreement which may be spelled out of the application of the plaintiff dated the 23rd August 1944 and the order of the Executive Engineer passed thereupon on the 26th August 1944 He says that the said application and the order made on an independent agreement whereby the Executive Engineer bound himself to execute a lease in favour of the plaintiff at some future date and hand over possession of the disputed property whenever the sitting tenants vacated it The application of the plaintiff dated the 23rd August 1944 makes an offer to the Executive Engineer that the plaintiff would accept leases for the disputed property at a specified rate of rent The order of the Executive Engineer dated the 26th August 1944 records an acceptance of the plaintiff's aforesaid offer The offer and acceptance of the promise would constitute an agreement under the Indian Contract Act and we think that the plaintiff would be entitled to damages for breach of that agreement if it could be held that the agreement was enforceable against the defendant

We may also state here that even if the documents Exs F G H and I were held to be non registerable documents the defendant can be fastened with the liability for damages upon their strength only if it could be held that those documents evidenced an agreement which was enforceable against the defendant All those documents recite in their preambles that the plaintiff had acquired the demised property from *His Majesty the King Emperor of India* through the Executive Engineer So far as the order of the Executive Engineer dated the

26th August, 1944, goes it does not even mention that the order was being passed in the name of His Majesty the King Emperor of India The order of the Executive Engineer and the documents Exs F G H and I were passed and executed in the year 1944 when the Government of India Act 1935 was in force Section 175 (3) of the Government of India Act 1935 enjoins that all contracts made in the exercise of the executive authority of a Province shall be expressed to be made by the Governor of the Province and all such contracts made in the exercise of that authority shall be executed on behalf of the Governor by such persons and in such manner as he may direct or authorize Section 175 (3) thus lays down the procedure for the execution of contracts by the Government of a Province Two things are necessary under this provision firstly the contract should be expressed to be made by the Governor of the Province, and secondly, the contract should be executed by such person and in such manner as the Governor may direct or authorize As far as the second condition is concerned it is fulfilled in this case because it is not disputed before us that the Executive Engineer Sri Shyam Lal had the authority to execute the contract on behalf of the U P Government But the first condition glaringly remains unfulfilled Neither the documents Exs F, G H and I nor the order of the Executive Engineer dated the 26th August 1944, as already stated are expressed to be made by the Governor of the United Provinces Since they are not expressed to be made in the name of the Governor of the United Provinces they cannot impose any obligation on the Government of U P *Proprio vigore* they are incapable of being enforced against the Government of U P notwithstanding the fact that they may evidence a valid and binding agreement between the plaintiff and the Executive Engineer

In the case of *Brij Lal* v *State of U P* (1) it was held by Mr Justice MOOTHAM, (as he then was), that the provisions of sub section (3) of section 175, Government of India Act, 1935 were mandatory It was

(1) A I R 1958 All 395

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observed by him that a contract executed on behalf of the Government of the Province should not only be executed on behalf of the Governor of the Province but also in his name The agreement in that case did not purport to have been made in the name of the Governor of U P and it was held that it was not a binding agreement

Section 175 (3) aforesaid corresponds with Article 299 (1) of the Constitution In the case of *Chaturbhuj Vithaldas v Moreshwar Parasharam* (1) the contracts were not expressed to be made by the President of India as required by Article 299 (1) and it was argued that they were therefore void Dealing with this contention Bose J was pleased to observe as follows

> It may be that Government will not be bound by the contract but that is a very different thing from saying that the contracts as such are void and of no effect It only means that the principal cannot be sued but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government

The following deductions can be made from that decision firstly contracts which are not expressed to be made in the name of the President or the Governor, are not void secondly such contracts are not enforceable against the Union or the State Government, and thirdly, they would become enforceable against the Union or the State Government if they are ratified by them

In the case of *Thawardas Pherumal v Union of India* (2) the contract in question was executed by the Additional Chief Engineer and not by the Executive Engineer It seems that the Additional Chief Engineer was not authorized to enter into an agreement on behalf of the Dominion Government and it was observed by the Supreme Court that Governments can only be bound by contracts which are entered into in a particular way and which are signed by proper authority The Calcutta High Court has also adopted a similar view, *vide Ghosh Singh Partners Ltd v Union of India* (3)

(1) A I R 1954 S C 236 (2) A I R 1955 S C 468
(3) A I R 1959 Cal 232

All the abovementioned cases clearly show that if a contract is not expressed to be made in the name of the Governor of Province it will not be enforceable against the Government of that Province We have already seen that in the present case the documents Exs F G H and I and the order of the Executive Engineer dated the 26th August 1944 are not on their face expressed to be made in the name of the Governor of the United Provinces Consequently these documents and the order of the Executive Engineer do not make out an agreement binding on and enforceable against the defendant The order of the Executive Engineer may also be void for uncertainty but we do not express any final opinion thereon

Learned counsel for the plaintiff respondent at this stage pointed out that the defect in the form of documents which we have already discussed above was not pleaded in the written statement nor was it taken at any stage in the trial court He also points out that the memorandum of appeal does not contain any ground to the effect that the documents aforesaid do not make out an enforceable contract The defendant should not therefore be permitted to raise this objection at this late stage If the defendant were permitted to raise this objection at this stage it would cause serious prejudice to the plaintiff inasmuch as he would be deprived of an opportunity of proving that the agreements in question were ratified by the Government He says that in the circumstances the objection regarding the enforceability of the agreement is not a pure question of law but is a mixed question of law and fact and should not be permitted to be raised at the stage of arguments in appeal We are not inclined to accept this line of argument of learned counsel for the plaintiff

We have no hesitation in saying that if the contending parties in the present suit were two individuals, it would not have been just and proper for the Court to permit the defendant to object for the first time at the stage of arguments in appeal that the suit contract was not enforceable against him, because in that case the plaintiff would not be able to plead ratification of the

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contract by the defendant Ratification is essentially a question of fact and the plaintiff would adduce no evidence to prove ratification if the defendant had not questioned the enforceability of the contract at the proper stage If the defendant is permitted to object to the enforceability of contract at the stage of arguments in appeal for the first time, there is no doubt that it would cause serious prejudice to the plaintiff Courts have therefore, generally held that parties in appeal should not be permitted to raise objections which are not pure questions of law and which require further investigation of facts, if such objections have not already been taken in the trial court at the proper time But the position in this case is fundamentally different on account of the fact that the defendant is not a private individual but the U P Government A person may file a suit against a private individual whenever he likes But a suit against the Government can be filed only after a notice under section 80 of the Code of Civil Procedure has been served upon the Government It is now well settled that the provisions of section 80 of the Code of Civil Procedure are mandatory and they must be strictly complied with One of the requirements of this section is that the notice, which is served upon the Government, should state the cause of action for the intended suit If a suit is instituted against the Government on the strength of a notice, which does not state the cause of action the suit would be liable to be dismissed Similarly, if the suit is instituted against the Government on the basis of a cause of action which is different from the cause of action stated in the notice, it would also be liable to be dismissed The object underlying the section is to give a clear and certain notice of the claim to the Government so that if it is so advised it may settle the claim and avoid the impending threat of a suit and consequential costs of the suit in the event of the claim being decreed and it has therefore, been held that it was not permissible for a suitor to institute a suit upon the basis of a cause of action which has not been stated in the notice, or which is substantially different from the cause of action stated in the notice

In the case of *Mc Inerny v The Secretary of State for India* (1) a suit was instituted against the Secretary of State for India for damages for negligence The notice served upon the Secretary of State for India under section 80 of the Code of Civil Procedure had stated that he was liable to be sued for damages for negligence The suit was dismissed whereupon the plaintiff filed an appeal In the course of the hearing of the appeal it appeared to the plaintiff that he could not succeed on the basis of negligence and, therefore, he made an application for the amendment of his plaint The prayer was that he should be permitted to change the cause of action from negligence to nuisance The application for amendment was not allowed on the ground that the notice under section 80 had not stated that the cause of action for the claim was founded on nuisance and it was said that the amendment sought to introduce a cause of action which was not mentioned in the notice JENKINS, C J, while disallowing the application for amendment thus observed

> The plaint as now proposed by way of amendment differs in an essential degree from the original plaint The original plaint proceeded upon negligence, whereas the new plaint proceeds upon nuisance in the form of obstruction on the highway so that it is impossible to say that the cause of action is the same This brings in the plaintiff's way the difficulty created by section 80 of the Code
>
> The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on negligence and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint

In the case of *Province of Madras v R B Poddar*, (2) a suit was instituted against the Provincial Government of Madras The plaintiff, in the course of trial wanted to amend the plaint by adding a new paragraph to it That amendment was allowed by the trial court,

(1) (1913) I L R 38 Cal 797 (2) A I R 1949 Mad 214

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and thereupon the Provincial Government went up in revision to the High Court and prayed that the order of the trial court allowing the amendment should be set aside, because the amendment introduced a new cause of action which had not been stated in the notice under section 80 of the Code of Civil Procedure The suit as originally framed, was for a declaration that the acquisition by the Government of certain property belonging to the plaintiff was illegal, *male fide*, unreasonable *ultra vires* and without jurisdiction The newly added paragraph to the plaint was to the effect that since the institution for the use of which the original acquisition has been intended had ceased to exist there was no further necessity for the acquisition and, therefore the Government should not take any further steps in relation to the acquisition It was held by GOVINDA MENON, J, that the amendment introduced a new cause of action which was inconsistent with the original one, and the order of the trial court allowing the amendment was consequently set aside The reason given by him for disallowing the amendment was that the plaintiff could not introduce in the plaint a cause of action which had not been stated in the notice under section 80 It will be useful to quote his observations on the point The learned Judge said as follows

> If this were a suit between two parties wherein the compelling necessity of a notice under section 80 Civil Procedure Code, did not exist probably an amendment like this if allowed in its discretion by a lower court would not be interfered by this Court But in this case, section 80 is an insuperable bar Notice stating the cause of action has to be given to the Government and a suit can be filed only 60 days thereafter Section 80 has to be strictly complied with and is applicable to all causes of action and all kinds of reliefs In the *Government of Province of Madras* v *Al Ar Ra Pellayan Chettiar* (1) this Court has held that section 80 Civil Procedure Code is explicit and mandatory Where the section has not been complied

(1) A I R 1944 Mad 544

with, a court has no jurisdiction to try the action instituted against the Government

After discussing some reported cases on the question the learned Judge went on to observe

> As I am of opinion that the amendment now allowed has introduced a fresh cause of action which was outside the scope of the suit as originally framed and was inconsistent with the allegation made earlier the learned Sub Judge was not justified in allowing the amendment now as *ex concessis* no previous notice has been served on the Government informing them of this new cause of action

There is thus no doubt that where a suit is instituted against the Government it is not open to the plaintiff to make a fundamental departure in his plaint from the cause of action already mentioned in the notice under section 80 of the Code of Civil Procedure In the instant case the plaintiff had served two notices on the U P Government The said notices were sent by registered post to the Collector of Kanpur One of them is dated the 5th January 1945, and is Ex N The other one is dated the 19th/23rd June 1945 and is Ex VIII Both these notices stated that on the 25th August, 1944 and 6th September 1944, the Executive Engineer Kanpur Division Lower Ganges Canal entered into contracts with the plaintiff for the lease of the suit properties, that the plaintiff was entitled to the vacant possession of the suit properties by virtue of the contracts dated the 25th August and 6th September 1944 and that, if possession of the suit properties were not delivered to the plaintiff within two months of the date of the receipt of the notices, the plaintiff would institute a suit against the Government for the specific performance of the contracts or for damages for breach of contracts It is noteworthy that nowhere in those notices either expressly or impliedly, has it been stated that the contracts were ratified by the Government, and the Government was therefore also liable on account of its ratification of the contracts The reason for this

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omission is obvious. It has never struck to the plaintiff or his advisers up to the time of arguments in appeal when one of us pointed out the serious infirmity in the documents evidencing the agreements to lease the suit properties that the agreements were unenforceable against the Government because they were expressed to be made in the name of His Majesty the King Emperor and not the Governor of U. P. as required by section 175 (3) of the Government of India Act, 1935. Only when it was pointed out by us that the agreements upon which he was seeking to rely could not impose any liability upon the Government because they had not been executed in conformity with the provisions of section 175 (3) of the Government of India Act, 1935, learned counsel for the plaintiff tried to salvage the case by falling back upon the plea of ratification of the agreements by the Government. Be that as it may, we are quite certain that neither of the notices mentioned the fact of ratification of the agreements by the Government. The plaint also does not mention any fact or facts which may enable us to hold that the plaintiff had taken the plea of ratification of the agreements by the Government. The evidence oral and documentary also does not indicate that the Government had in fact ratified the agreements in question.

In short the position therefore is this. Ratification of the agreements which are *ex facie* unenforceable against the Government, was not stated in the notices under section 80 of the Code of Civil Procedure. It was also not pleaded in the plaint and the record of the case does not contain any fact or facts which would show that the Government had in fact ratified the said agreements.

Agreements as they stand are defective and unenforceable against the Government. It may be that the plaintiff may sue the Executive Engineer on the strength of those agreements but that would not afford him a cause of action to lay the claim against the Government. The Government could be bound by those agreements only if it had ratified them. Agreements by themselves have

got no force and efficacy against the Government and the act of ratification alone could create a privity of contract between the plaintiff and the Government The act of ratification would, therefore, be a matter of substance and would constitute the vital link in the chain of facts which would make up the cause of action for a claim against the Government Minus ratification the plaintiff s cause of action against the Government is inchoate and incomplete Since the notice under section 80 of the Code of Civil Procedure did not mention the fact of ratification of the defective agreements by the Government, it would not be open to the plaintiff to introduce by way of amendment the plea of ratification in the plaint, for that would mean substantial variance from the notice *A fortiori* he cannot be permitted to urge that the defendant should not be allowed to impeach the enforceability of the agreements in suit for the first time at the stage of hearing of the appeal, because that would deprive him of the opportunity of proving ratification of the aforesaid agreements by the Government No question of prejudice can in law arise in this case if we permit the defendant to question the enforceability of the agreements for the first time at this stage on the ground of their non conformity with the provisions of section 175 (3) of the Government of India Act, 1935 because the plaintiff did not state in his notice under section 80 that the Government had ratified the aforesaid agreements, and he cannot now be permitted to take that plea We have consequently permitted the defendant to argue that the agreements, which were the basis of the suit in this case, were not expressed in the name of the Governor of U P and could not, therefore, be enforced against the Government of U P If any authority is needed to support what we have done it will be found in a decision of their Lordships of the Supreme Court in the case of *Keshavlal Lallubhai Patel* v *Lalbhai Trikumlal Mills Ltd* (1) In that case a suit was filed for the recovery of damages for breach of contract for non delivery of certain cotton goods The plaintiff s claim was decreed by the trial court, but on appeal it

(1) A I R 1959 S C 512

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was dismissed The High Court dismissed the claim on the ground that the agreement was vague and uncertain No such plea was ever taken in the trial court nor even in the grounds of appeal It was contended that the appellate court went wrong in allowing the appellant to raise an objection for the first time in appeal that the agreement was vague and uncertain Mr JUSTICE P B GAJENDRAGADKAR repelled that contention and observed as follows

> It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal After all, the plea raised is a plea of law based solely upon the construction of the letter which is the basis of the case for the extension of time for the performance of the contract and so it was competent to the appeal court to allow such a plea to be raised under Order 41, rule 2 C P C If, on a fair construction, the condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty The provisions of section 93 of the Indian Evidence Act are clear on this point It is the language of the document alone that will decide the question It would not be open to the parties or to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence Such an attempt would really mean the making of a new contract between the parties That is why we do not think that the appellants can now effectively raise the point that the plea of vagueness should not have been entertained in the High Court'

Just as in that case the agreement was on its face vague and uncertain and no extrinsic evidence could be produced to remove the vagueness and uncertainty in the agreement, similarly in this case the agreements on their face are unenforceable against the Government and no evidence can be introduced in the case to prove that the Government had ratified those agreements because the fact of ratification has not been stated in the notice

under section 80 of the Code of Civil Procedure The question that the Government cannot be sued for damages for breach of those agreements therefore, is a question of construction of the agreements and is a pure question of law and may be permitted to be raised for the first time at the stage of the hearing of the appeal under Order XLI rule 2, Civil Procedure Code

Reliance was placed by learned counsel for the plaintiff on the decision of their Lordships of the Supreme Court in *Kalayanpur Lime Works Ltd v State of Bihar* (1) The plaintiff appellant in that case filed a suit against the State of Bihar for the specific performance of a contract The suit was decreed by the trial court but on appeal the Patna High Court reversed the judgment and dismissed the suit One of the grounds for dismissing the suit was that the contract, not having been executed by the proper authority, was not enforceable against the Government on account of section 30 of the Government of India Act, 1915 On appeal before their Lordships of the Supreme Court it was urged on behalf of the plaintiff that the defendant did not plead in its written statement that the contract was unenforceable because it had not been executed by the Collector who was admittedly the proper authority for that purpose There was no ground in the memorandum of appeal to that effect, and the High Court should not have permitted the defendant to take that objection for the first time at the stage of arguments in appeal Their Lordships of the Supreme Court upheld the contention and ruled that the objection ought not to have been allowed to be raised We have given our careful consideration to the case, and it seems to us that the decision in that case turned on its own peculiar facts It appears that the plaintiff had sent six copies of the draft leases to the Collector for signature Two of them were returned to him and they did not bear the signature of the Collector The other four copies were not produced by the defendant, so that the plaintiff s argument was that if the defendant had taken the plea of unenforceability of contract at the proper time, he would have procured the production of

(1) A I R 1954 S C 165

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the four withheld draft leases which would have shown that they bore the signature of the Collector In those circumstances, it is quite evident that the objection about the unenforceability of the contract was not a pure question of law but it also involved investigation of the fact whether the withheld draft leases were signed by the Collector

In the case before us, it has not been urged that there was some other document of lease which was expressed to be made in the name of the Governor The notices under section 80 of the Code of Civil Procedure and the plaint alleged that the plaintiff and the Executive Engineer entered into an agreement for the lease of the disputed plots on 25th August 1944, and that the plaintiff signed on 26th August, 1944 some documents In his statement in court the plaintiff admitted that on 25th August, 1944, the Executive Engineer had agreed orally to let out the disputed plots to him He also admitted in cross examination that both he and the Executive Engineer had signed the printed lease forms on 26th August, 1944 He did not state that he had signed some other documents besides the printed lease forms, which are Exs F, G H and I He thus founded his claim on the said documents alone We may also mention here that while the defendant s counsel was arguing before us on 16th July 1959, we invited the attention of counsel for the plaintiff to the aforesaid flaw in the documents Exs F, G, H and I Counsel for the plaintiff opened his arguments on 20th July 1959 and made an unequivocal statement which has gone down in the notes of arguments made by one of us, that the order, dated the 26th August, 1944, of the Executive Engineer accepting his offer constituted the basis of his claim He did not then say that there were some other documents evidencing the agreement between him and the Executive Engineer and they were expressed to be made in the name of the Governor

There is one other circumstance which distinguishes this case from the *Kalyanpur* case (1) While in that case

(1) A I R 1954 S C, 145,

the defendant had not denied in its written statement the enforceability of the contract, in this case the defendant has made an averment in paragraphs 21 and 22 of its written statement that the leases, Exs F, G, H and I were void and unenforceable, and correct legal procedure had not been observed in their execution No doubt the defence, that the leases aforesaid were unenforceable for non-compliance with the provisions of section 175 (3) of the Government of India Act, 1935, has not been pleaded specifically in so many words, but such a plea was implied in the facts stated in paragraphs 21 and 22 of the written statement To sum up, we consider that in view of the distinguishing features indicated above, the *Kalyanpur* case (1) is not applicable to the facts of this case

We have carefully perused the entire evidence in the case and we are satisfied that, in the circumstances of this case, the Government could not have probably ratified the agreements in question As already stated, the agreements, marked Exs F, G H and I, were entered into on the 26th August, 1944 It appears that possession of the demised property was not given to the plaintiff, so that on the 22nd November, 1944, the plaintiff sent a letter Ex XIII, to the Executive Engineer requesting that he should arrange for delivery of possession at his earliest convenience Possession could not still be delivered, and hence the plaintiff sent a notice under section 80 of the Code of Civil Procedure to the Collector Kanpur, on the 5th January, 1945 A reply to the notice was sent from the office of the Executive Engineer on the 23rd February, 1945 The reply letter is Ex IV It states that as it was not possible to give possession of the demised property to the plaintiff, the amount of Rs 6,126 which was deposited by the plaintiff on account of rent in advance, was being returned by a crossed cheque Thereafter the plaintiff served another notice under section 80 on the Collector, Kanpur, on the 19th/23rd June, 1945 In reply to that notice the office of the Executive Engineer informed the plaintiff by its letter, Ex X dated 25th/27th August, 1945, that

(1) A I R 1954 S C 165

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the leases executed by the plaintiff and the Executive Engineer were unregistered and were not legally binding

The defendant examined one Deep Chand, Overseer Canals, on its behalf He stated in cross examination that the leases of lands adjoining the canal bank Kanpur, had always been executed by the Executive Engineer and the confirmation or ratification of such leases by any other authority was not necessary According to him the Executive Engineer, Canals was the final authority for giving leases of lands adjoining the canal bank irrespective of the term of the leases It would thus appear from his cross examination that the agreements in question could not have been sent to the Government for ratification

Learned counsel for the plaintiff then invited our attention to paragraph 5 of the plaint as well as written statement In paragraph 5 of the plaint it is averred that the offer of the plaintiff, being the highest offer was accepted by the Executive Engineer for and on behalf of the defendant and it was settled that the plaintiff would be given the lease of the disputed lands for five years It is further stated that the plaintiff was asked to deposit Rs 6 000 as six months rent in advance and the plaintiff deposited the said amount on the 25th August, 1944 Paragraph 3 of the written statement filed by the defendant states that the contents of paragraph 5 of the plaint were admitted Learned counsel for the plaintiff submits that the defendant s admission of the facts stated in paragraph 5 of the plaint would amount to ratification of the agreements in question by the defendant and the claim of the plaintiff cannot, therefore, be said to have been wrongly decreed by the trial court This argument though apparently plausible and attractive, is inherently fallacious Ratification, as we have already said is an essential link in the chain of facts which would constitute the plaintiff s cause of action against the defendant Without ratification the plaintiff would have no cause of action to institute a suit against the defendant A cause of action must be antecedent to the suit and it cannot be spelt out of any allegation

made in the pleadings of the parties in the suit itself See *Ramjoy Modak* v *Durga Charan* (1) We accordingly reject the contention of learned counsel for the plaintiff that the defendants admission of the facts mentioned in paragraph 3 of the plaint amounted to ratification of the questioned agreements

Learned counsel for the defendant lastly contended that the trial court has erred in awarding damages to the plaintiff The plaintiff and the Executive Engineer had undoubtedly entered into agreements to the effect that the latter would let out some lands belonging to the Government in the city of Kanpur Later on, for reasons which are not material in deciding the question of damages, the Executive Engineer failed to deliver possession of the demised property and tried to resile from the agreements There was, therefore, undoubtedly a loss of bargain to the plaintiff and he was entitled to get appropriate damages for the loss of bargain It appears from the evidence that after resiling from the agreements the Executive Engineer let out by public auction the two plots in Sabzi Mandi and Ghasiari Mandi The remaining two plots, which were also to be let out to the plaintiff, were however, not let out by the Executive Engineer and they were retained by the Government The plaintiff had offered a rent of Rs 18 6 8 per day for the plot in Sabzi Mandi and Rs 11 14 per day for the plot in Ghasiari Mandi The total of these two items comes to Rs 30 4 3 These two plots were let out by a subsequent public auction at Rs 46-4 per day It seems that in the course of arguments before the trial court learned counsel for the parties had made an agreed statement that the profits from the aforesaid two plots could be estimated at 25 per cent of the daily rental of the plots In other words the estimated profits calculated at the rate of 25 per cent would be about Rs 11 and odd per day Calculated at this rate the total amount of estimated profits for a period of five years which was the term of the leases would exceed the sum of Rs 13,200, which has been awarded as damages by the trial court We think that, in the circumstances of this case, damages to the

(1) A I R 1929 Cal 830

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DAYAL J.

tune of Rs 13,200 are not excessive Kanpur is the biggest industrial city in this State and daily profit of Rs 11 from the lands in Sabzi Mandi and Ghasiari Mandi does not appear to be improbable We believe that the plaintiff could have made even higher profits But since he has agreed to claim damages at the rate of about Rs 11 per day, he is not entitled to an amount higher than the sum of Rs 13,200 which was awarded to him by the trial court

The result of the foregoing discussion is that the appeal of the defendant will have to be allowed and the plaintiff's suit dismissed Since the appeal is being allowed mainly on a ground which had not been specifically taken by the defendant either in the trial court or before us, until it was indicated by one of us to learned counsel for the defendant, we consider that it will be proper to make the costs easy here as well as in the trial court Accordingly we allow this appeal and set aside the judgment and decree of the trial court and dismiss the suit The parties shall bear their own costs in circumstances of the case The cross-objection is also dismissed

Appeal allowed

APPELLATE CIVIL

*Before Mr Justice V D Bhargava**
and Mr Justice Nigam

MAHENDRA SHANKER SRIVASTAVA (APPELLANT)
v
K C MITTAL, DISTRICT MAGISTRATE LUCKNOW AND OTHERS (RESPONDENT)

1958
December
11

Allotment of the House—*Requisition for public purpose—Allottee—Notice—Occupation, scope of United Provinces (Temporary) Accommodation Requisition Act 1947 s 3, applicability of*

The District Magistrate Lucknow on April 12 1958 requisitioned the house no 97 situate at Lukmanganj Lucknow under s 3 of the U P (Temporary) Accommodation Requisition Act 1947 This house was allotted to and was occupied by Sri B L Srivastava who shifted to a house he built for himself M S Srivastava the petitioner was living with B L Srivastava as a guest or as a relation he applied for allotment but on April 12 1958 a notice was served by the District Magistrate on B L Srivastava that the house was requisitioned and B L Srivastava was directed to hand over possession to the Rent Control and Eviction Officer Lucknow M S Srivastava contended that he was an occupier and he should be served with the notice

Held that the person who was living as a guest of the allottee cannot be considered to be an occupier of the premises and the occupation of the applicant was only with leave and licence of the allottee

Held further that the petitioner had no *locus standi to* challange the validity of the District Magistrate's order as he was not an occupier

Special Appeal No 34 of 1958 against the order passed by Tandon J, dated 15th September, 1958

The facts appear in the judgment

K S Varma for the appellant

Standing Counsel for the respondents nos 1 to 3

The judgment of the Court was delivered by—

V D BHARGAVA, J —This is an appeal against an order of a learned Single Judge of this Court in a writ petition dismissed by him *in limine* The writ petition

*Sitting at Lucknow

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V D Bhargava J

was filed seeking to obtain a writ quashing the order of the District Magistrate, Lucknow, dated 12th April 1958 by which he had requisitioned under section 3 of the U P (Temporary) Accommodation Requisition Act, 1947, a house no 97 situate at Lukmanganj, Lucknow This house was allotted to and was occupied by Bihari Lal Srivastava He had built his own house and he was likely to shift to that building and possibly he had shifted The petitioner was living with Bihari Lal according to his contention as a guest or as a relation When Bihari Lal practically completed his house, the petitioner moved the Rent Control and Eviction Officer to allot the premises in dispute in his favour but no allotment was made On the contrary on 12th April, 1958, a notice was served by the District Magistrate on Bihari Lal Srivastava, the allottee of the accommodation, that the premises had been requisitioned under section 3 of U P (Temporary) Accommodation Requisition Act, 1947, for public purpose By the same notice Bihari Lal Srivastava was directed to give possession of the premises to the Rent Control and Eviction Officer, Lucknow The contention of the petitioner is that though Bihari Lal Srivastava was served with a notice but no such notice was given to him although he was an occupier of the premises

The petitioner further contended that he was assured by the District Magistrate that an alternative accommodation will be provided to him but no such accommodation has been provided and therefore he cannot be ejected under section 3 of the Act till an alternative accommodation is provided to him

The learned Single Judge was of opinion that the petitioner was not an occupier and had no right to remain in the premises and consequently he dismissed the petition Aggrieved by that decision this appeal was filed

We have heard learned counsel for the petitioner and we are of opinion that the petitioner is not an occupier of the premises He was staying in the house according to his own contention as a guest of Behari Lal Srivastava That would not give him any right to occupy the house

It was open to Behari Lal Srivastava at any time to ask him to vacate the premises and therefore the occupation of the applicant was only with leave and licence of Behari Lal and that did not create any such right in the petitioner as to make him an occupier within the definition of the word under the U P (Temporary) Accommodation Requisition Act 1947

It was also contended by the learned counsel for the applicant that the requisition by the District Magistrate was not for a public purpose We do not wish to go into that question because unless the petitioner has a *locus standi* to maintain the petition, he can not challenge the validity of the District Magistrate s order The petitioner has no *locus standi* as he was not an occupier The writ petition was rightly rejected by the learned Single Judge

The appeal is accordingly dismissed

Since the appeal has been dismissed the stay order dated 17th October, 1958, is also discharged

Appeal dismissed

APPELLATE CRIMINAL

Before Mr Justice Mukerji and Mr Justice Broome

KHANZADEY SINGH

v

STATE

1959
March 11

Dacoity with murder—*Punishment for—General rule—Indian Penal Code* 1860 *s* 396

As a general rule the sentence of death should necessarily follow a conviction under s 396 Indian Penal Code unless a case is made out for awarding a lesser sentence and there is in that respect no distinction between this section and s 302 of the Code

Lal Singh v *Emperor* (1) disapproved on the ground that the distinction therein made is unsubstantial and inexpedient

Criminal Appeal No 148 of 1959 connected with Criminal Appeal No 9 of 1959 from an order of Sri

(1) A I R 1938 All 625 631

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KHANZADEY SINGH v. STATE

Chandra Prakash, 1st Additional Sessions Judge Shahjahanpur, in Criminal Sessions Trial No 150 of 1958 decided on 19th December 1958

The facts appear in the judgment

R N Mitra for the appellant

The Deputy Government Advocate for the State

The judgment of the Court was delivered by—

MUKERJI, J —Appeal no 9 of 1959 is by Peatey against his conviction under section 396 Indian Penal Code and a sentence of imprisonment for life awarded to him by the First Additional Sessions Judge of Shahjahanpur Appeal no 148 of 1959 is by Khanzadey Singh against his conviction by the same learned Judge at the same trial at which Peatey was convicted, under section 396, Indian Penal Code and a sentence of death There is the usual reference by the learned Judge for the confirmation of the sentence of death awarded by him to Khanzadey Singh

The facts giving rise to the aforementioned two appeals lie within a short compass and may briefly be stated as follows

On the night between the 10th and the 11th of April 1958 a band of 20 or 25 men broke into the house of one Balbir Sahai, while they were armed with firearms and other weapons, and there by the use of firearm caused the death of Ram Bharosey, brother of Balbir Sahai, Dwarka Prasad his uncle, Kumari Urmila Devi, his daughter, and Shyam Lal a neighbour of his Some of the other inmates of the house of Balbir Sahai were also injured These were Srimati Girja Devi the wife of Ram Bharosey, Srimati Sita Pyari, the wife of Madan Lal, and Dharam Vir At the time when the dacoits obtained access to the house of Balbir Sahai, Balbir Sahai was sleeping in the courtyard with his little daughter Urmila In the same courtyard slept his brother Ram Bharosey, his uncle Dwarka Prasad, and the sister in law Girja Devi Srimati Sita Pyari, another inmate of the house slept in a verandah adjoining the courtyard On the outside slept Madan Lal and Dharam Vir They slept near the flour mill and the crusher which had been fixed in

the house and belonged to Balbir Sahai All the aforementioned people received injuries

The first knowledge that the house had been raided by dacoits was when Balbir Sahai was fired at from the roof by one of the dacoits This shot caused injury to Balbir Sahai and some others that slept in the courtyard and also brought about the death of the little infant Urmila Soon after the firing of the first shot two dacoits jumped into the courtyard with *lathis* One of the dacoits while jumping stumbled, fell and sustained some injury When the dacoits had jumped into the courtyard Balbir Sahai and Ram Bharosey made an attempt to tackle them with the result that the other dacoits who were on the roof jumped into the courtyard to the assistance of their two companions who had jumped into the courtyard earlier In all some 10 or 12 dacoits got into the courtyard of Balbir Sahai Dwarka Prasad and Ram Bharosey were shot and killed by the dacoits because they attempted to grapple with some of the dacoits in the courtyard After causing injuries and killing people the dacoits thought of leaving the house for, apparently they found that they had raised the entire village and the villagers in large numbers were collecting outside Shyam Lal one of the neighbours set a thatch hut on fire in order to obtain a brilliant source of light which could illuminate the entire area and thereby make recognition easy and apprehension of the miscreants possible The dacoits, when they found Shyam Lal setting fire to the thatch hut and declaring that he had recognized people shot at Shyam Lal and killed him The dacoits left without taking any property from the house The sources of light inside the courtyard were a lantern which was burning there, the reflected light from the flashing of torches which the dacoits themselves indulged in, and later on the light which emanated from the burning thatch hut just outside the courtyard

The dacoits had been seen by witnesses of both kinds, namely those that were the inmates of the house and those that collected from outside None of the dacoits seems to have been recognized for they were unknown in

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the witnesses In evidence however, it has appeared that Shyam Lal was shot and killed when he shouted out that he had recognized some dacoits whether Shyam Lal did recognize some one among the miscreants or not cannot now be known

A first information report of the incident was made at police station Sindhauli which was five miles from Deoria Kalyanpur, the village of incident on the 11th of April 1958, at 6 45 a m The report had been written out by Balbir Sahai at the village and had been sent to the police station through Ajudhia Prasad Yadav The Station Officer Har Bhajan Singh was present at the time when Ajudhia Prasad handed the written report Ex Ka 10 at the police station So that Har Bhajan Singh at once left for the place of occurrence On reaching there Har Bhajan Singh recorded the statements of Balbir Sahai, Girja Devi Madan Lal, Dharam Vir, Sita Pyari, Hira Lal, Hemraj Ram Lal, Bulaqi, Prabhu Munna Lal and a few others He inspected the four dead bodies and prepared inquest reports in respect of these and thereafter he sent the bodies to the Sadar mortuary for post mortem examination through two constables He also sent the injured for medical examination A site plan was also prepared by the Investigating Officer The Investigating Officer found the chain of one of the western doors of the house of Balbir Sahai broken Satbir Singh brought out five cartridges from inside the house and handed them over to the Investigating Officer Five other cartridges were handed over to him which had been picked up from outside the house Two separate memorandum were prepared in respect of the cartridges found from the two places The cartridges were separately sealed One hundred and eighty three pellets 25 wadi were also found in the courtyard and round the walls of it and these were also taken in possession and a proper recovery memorandum prepared in respect of these Six pellets were recovered from the cot of deceased Urmila These were also sealed and a recovery memorandum prepared Certain blood stained garments were also taken possession of by the Investigating Officer

The injured were examined and their examination revealed that some had gun shot injuries, while others had *lathi* injuries on their persons

A post mortem was performed on the body of Ram Bharosey on the 12th of April 1958 at 3 p m His autopsy revealed that he had died of gun shot injuries

Shyam Lal s body was subjected to a post mortem on the same day at 5 p m and his autopsy revealed that he too had died of gun shot injuries

The autopsy on Dwarka Prasad s body was held at 2 p m on the same day and in his case there were over and above the gun shot wounds two contusions which could be ascribed to *lathis* injuries but in his case too death was due to the gun-shot injuries

The autopsy on the body of Kumari Urmila was performed at 4 p m on the 12th of April, 1958, and it revealed that she too had died of gun shot injuries

On the 27th of April, 1958, Har Bhajan Singh happened to go to police station Muhamdi in connection with the investigation of another dacoity and there he learnt that that day i e 27th April 1958 the police of Muhamdi had arrested three persons Lallu, Rajjab Ali and Peatey The Investigating Officer came to know thereafter that these three arrested persons could have been participants in the dacoity at the house of Balbir Sahai On the 2nd of May, 1958 Khanzadey Singh the appellant in Appeal no 148 of 1959 was arrested at 1 30 a m near the bridge of Musasil, by Har Bhajan Singh himself The arrested persons were made *ba parda* and sent to the police lock up At the time of the arrest of Khanzadey Singh he was found to be in possession of a country made gun and five cartridges A recovery memorandum, therefore, was prepared at the spot and the same was witnessed by four persons, Itwari Chamar Duja Chamar Shanker Lal and Subedar This recovery memorandum, Ex Ka 58, is a detailed document and gives a detailed description of the gun and the cartridges as also the *khaki jhola* which too was found in the possession of Khanzadey Singh Two of the witnesses who witnessed the recovery

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Mukerji, J

memorandum namely Shanker Lal and Duja, were produced in court and they satisfactorily proved the recoveries which were alleged to have been made from the person of Khanzadey Singh

Pearey, appellant in Appeal no 9 of 1959, denied all connection with the incident His case was that he had been falsely implicated in the case and that he was after his arrest, shown to the witnesses He further took the plea that he was known to Balbir Sahai because he used to bring grain to the flour mill of Balbir Sahai for purposes of having it ground and that during one such transaction he had a dispute with Prabhu, P W 4, who was in the service of Balbir Sahai

Khanzadey Singh appellant in Appeal no 142 of 1959, made a statement to a Magistrate in which he more or less admitted having taken a certain part in the dacoity which was committed in the house of Balbir Sahai This statement of Khanzadey Singh was recorded on the 31st of May, 1958 It appears that the Investigating Officer had made a report to the effect that Khanzadey Singh was likely to make a confession but before action could be taken on that it appears that Khanzadey Singh himself sent an application to the District Magistrate of Shahjahanpur on the 8th of May, 1958, in which he expressed a desire to make a statement disclosing true facts to the District Magistrate What Khanzadey Singh said in that application was this

> Shriman Ji Meri hardik ichcha hai ki huzur ki sharan men pahunch kar Shriman ke pratyaksh satya satya kahne ka avsar prapt ho

On receiving this application the District Magistrate, Sri S P Areen directed his City Magistrate to go to the jail and record Khanzadey Singh's statement The City Magistrate accordingly went to the jail on the 26th of May 1958 but Khanzadey Singh refused to make a statement to him and reiterated his desire to make a statement only to the District Magistrate Therefore, Sri Areen, the District Magistrate very properly, himself went to the jail on the 31st of May 1958 and then

Khanzadey Singh made a fairly long statement to him which was recorded by the District Magistrate The record of the statement made by Khanzadey Singh is Ex Ka 14 On the statement there is an endorsement to the effect that the Magistrate had explained to Khanzadey Singh that he was not bound to make a confession and further that if he did make one, the confession was likely to be used as evidence against him The learned Magistrate also warned Khanzadey Singh about making a confession and asked him several questions to find out whether or not Khanzadey Singh was going to make a statement under some threat, promise or some other temptation The learned Magistrate s impression was that Khanzadey Singh was making the statement voluntarily An examination of the answers which Khanzadey Singh gave at his preliminary examination by the learned Magistrate indicates to us also that Khanzadey Singh made his confession voluntarily

The evidence against the two appellants Pearey and Khanzadey Singh in the two respective appeals, is chiefly of identification in the case of Pearey it is purely so while in the case of Khanzadey Singh apart from the evidence of identification there was his own statement and further there was the corroborative evidence furnished by the expert evidence of Shyam Narain, the Ballistic Expert to Government which showed that the gun which had been recovered from the possession of Khanzadey Singh at the time of his arrest was one of the guns which had been used at the time when the dacoity had been committed in the house of Balbir Sahai, for one of the empty cartridges which had been picked up from the place of incident appeared without doubt to have been fired from the gun which was recovered from Khanzadey Singh s possession

Khanzadey Singh was examined in the Magistrate's Court during the commitment proceedings on the 18th of August 1958 and there among other things that he stated he also stated that shots had been fired during the course of the dacoity but not with the object of killing but with the object of scaring away people He

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certainly stated in that statement that he had gone to commit a dacoity He also, curiously enough, said that he was caught in the course of the same dacoity When asked Do you want to say anything else he answered as follows

> I and 20—22 other persons went to commit a dacoity at the house of Balbir Sahai I had a country made gun, while the rest had English guns, *kantas*, spears and *sujas* All of us committed *loot mar*, we got property worth Rs 100—Rs 150 in the dacoity Guns *lathis*, etc were used to scare away People received injuries and lost their lives in the course thereof Both these accused were not with me

By the last sentence he apparently meant Pearey and Nankai Singh (an accused who was convicted by the learned Sessions Judge but whose appeal is not before us) In the Court of Sessions Khanzadev Singh admitted having made the statement dated the 18th August, 1958, before the Committing Magistrate s Court He further admitted that he hed sent an application to the District Magistrate and had made a statement to him and that the said statement (Ex Ka 14) was correct In the Court of Sessions, however, Khanzadey Singh said that he did not fire the gun though he admitted having had a gun and admitted hevng gone to the house of Balbir Sahai to commit a dacoity

The question that arises in connection with Khanzadey Singh s appeal is whether there was sufficient evidence to justify his conviction under section 396, Indian Penal Code, and further whether the sentence which had been awarded to him by the trial Judge, namely the sentence of death was a proper sentence Khanzadey Singh was put up for identification on the 19th of May, 1958 All his distinctive marks were hidden and he was mixed with 20 other undertrials and every precaution was taken by the Magistrate who conducted his identification parade, to see that the identification was a fair and honest identification Khanzadey Singh was identified by Balbir Sahai Girja Devi Madan Lal Dharam Vir, Hemraj,

Sita Pyari Bulaqi Ram Lal, Hira Lal and Munna Lal The learned Judge did not rely on the identification of Madan Lal Dharam Vir and Hira Lal because he found the probative value of their identification not very good, but the value of the remaining seven witnesses was found satisfactory by the learned Judge and we have ourselves seen absolutely no reason to take a different view These witnesses had ample opportunity and on the prosecution case which we believe there was ample light which made visibility and recognition fairly certain Khanzadey Singh s plea at the time of the identification parade that he had been shown to witnesses at police station Sindhauli was in our opinion false The identification evidence against Khanzadey Singh was therefore, overwhelming As we have said earlier, there was as against Khanzadey Singh further evidence to show his guilt and that evidence lay in the fact that the gun which had been recovered from his possession was shown to have been one of the guns which was used at the time of the dacoity because one of the spent cartridges which had been picked up from the scene of occurrence was shown to have been fired from this gun The evidence of Shiam Narain, the Ballistic Expert left no room for doubt on this score We have already noticed that the evidence of the recovery of the gun from Khanzadey Singh s possession was satisfactory The evidence therefore of Khanzadey Singh s participation in the incident was overwhelming and indeed on his own statement he admitted that he had participated in the dacoity, though, according to him, he was not responsible for any of the murders which had been committed during the course of the dacoity

Mr *R N Mitra*, appearing on behalf of Khanzadey Singh, contended that the sentence of death which had been awarded to Khanzadey Singh was not an appropriate sentence His contention was that the evidence did not indicate that any of the people who died, died as a result of the firing indulged in by Khanzadey Singh It is no doubt true that the witnesses did not state that Khanzadey Singh in particular, fired at any person and that as a result of his firing any particular individual

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met his death, but on the evidence it is perfectly clear that Khanzadey Singh used his gun and was one of the gunmen forming part of the assembly of dacoits. Under section 395 Indian Penal Code, the sentence which is awardable is either death, or imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and also fine. Mr. *Mitra* relied on a decision of this Court in *Lal Singh* v. *Emperor*(1) to contend that as a general rule a sentence of death should not follow a conviction under section 396 Indian Penal Code and that a sentence of death should only be imposed under section 396 Indian Penal Code when there was evidence to indicate that the accused had been responsible for killing some one with his gun. We regret we are unable to accept this contention of Mr. *Mitra*. The observations on which reliance was placed by Mr. *Mitra* were in these words at page 631 second column:

> We do not consider that as a general rule a sentence of death should necessarily follow a conviction under section 396 Indian Penal Code and this section differs from section 302 Indian Penal Code, in that respect. The rule is under section 302 that a sentence of death should follow unless reasons are shown for giving a lesser sentence. No such rule applies to section 396, Indian Penal Code.

As we read section 302 Indian Penal Code we find that section saying:

> Whoever commits murder shall be punished with death or transportation for life and shall also be liable to fine.

Section 396, Indian Penal Code, says this:

> If any one of five or more persons who are conjointly committing dacoity commits murder in so committing dacoity *every one of those persons* shall be punished with death or transportation for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

(1) A. I. R. 1928 All. 625.

The obligation in the matter of imposing the sentence is, in our judgment, in the same sequence in the two sections only that in section 396 Indian Penal Code, the scope of the discretion is larger in so far as there is the possibility of imposing a sentence lesser than death or transportation for life (now imprisonment for life) for an offence punishable under this section

Section 367 of the Code of Criminal Procedure, as it stood before the amendment of 1955, by clause (5) cast a duty on the court to record its reasons for not inflicting a death penalty on a conviction for an offence which was punishable with death That obligation was not confined to the awarding of a sentence under section 302, Indian Penal Code, only, for death was a punishment prescribed and awardable for a conviction under section 396 Indian Penal Code, also Therefore, in our opinion—and we express it with respect—the distinction that was seen by the learned Judge in *Lal Singh's* case (*supra*) was an unsubstantial distinction at any rate the wordings of the relevant sections, which we have quoted above, did not justify that view After the amendment to section 367, Criminal Procedure Code, in 1955 it is no longer obligatory for the trial Judge to give reasons for imposing the lesser penalty, but that amendment has nothing to do with the point that has cropped up for our decision what we have to decide is whether, as we said before, the sentence that had been imposed by the trial Judge on Khanzadey Singh was an appropriate sentence In our opinion it certainly was, for we have found that Khanzadey Singh not only participated in the dacoity but also used his gun and there is no presumption that a gun when fired misses its mark Punishment is awarded in order to achieve any or as many as possible of the four objectives, namely to serve as deterrent, to be preventive, to be reformative and to be retributive Of these four the first is the all important one, others being merely accessory Punishment has to be before all things deterrent, for the chief end of the law of crime is to make the evil doer an example and a warning to all that are like-minded with him.

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Punishment is intended to prevent offences being committed by destroying the interests to which they owe their origin by making all deeds which are injurious to others injurious also to the doers of them LOCKE rightly thought that punishment must make the evil doer feel that his act was an ill bargain for him

The confession which Khanzadey Singh made and which has been held to have been made voluntarily by him indicated that this was not his first venture in dacoity Further crimes of violence with the aid of firearms, whether they be of local manufacture or not are becoming more and more common Courts cannot shut their eyes to common trends which magnify the results of a crime for courts are called upon in the discharge of their duties to make out punishment to criminals with the sole object of protecting society against acts of criminality So that, unless courts properly consider the question of sentence in relation to the situation in which a crime is committed and the nature of the crime keeping in mind also the fact as to how often such crimes are committed courts will never be able to discharge their obligation properly We therefore are of the opinion that whatever may have been the position in regard to the use of firearms at dacoities in the year 1958, when *Lal Singh's* case was decided the position has considerably worsened since then and it is necessary, in our opinion, therefore to view dacoities in which firearms are used with seriousness and that whenever a dacoit is proved to have used a gun in the course of the dacoity whether he actually killed or injured some one or not he should be awarded a sentence of death We are of the opinion that the element of the deterrent in such cases should be given its proper place in assessing the measure of the punishment We therefore, are of the opinion that the sentence which had been imposed on Khanzadey Singh namely the sentence of death, was well merited We accordingly affirm that sentence

Reverting now to the appeal of Pearey, the evidence against him consisted as we have stated earlier, of identification alone He had been identified by Balbir Sahai,

Girja Devi and Prabhu Both Balbir Sahai and Girja Devi were injured None of the three witnesses made any mistake We have already held that these witnesses had ample opportunity of seeing the appellant, Pearey and that visibility at the time was good So that, in our opinion the evidence against Pearey was also sufficient to warrant his conviction We accordingly uphold his conviction and his sentence as well

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In the result we dismiss Pearey's appeal (Appeal no 9 of 1959) and uphold his conviction under section 396 Indian Penal Code and his sentence of imprisonment for life We also dismiss Khanzadey Singh's appeal (Appeal no 148 of 1959) and uphold his conviction under section 396 Indian Penal Code, and his sentence of death The reference by the trial Judge for the confirmation of the sentence of death awarded by him to Khanzadey Singh is accepted The same shall be carried out in accordance with law

Appeal dismissed

CIVIL MISCELLANEOUS

Before the Honourable O H Mootham, Chief Justice and Mr Justice Dayal

SWARUP SINGH (APPLICANT)

v

ELECTION TRIBUNAL, MUNICIPAL BOARD, ALIGARH AND OTHERS (OPPOSITE PARTIES)

1959

April 21

Municipal Election—*Ballot paper marked on the back only—Whether and when to be counted—United Provinces Municipalities (Conduct of Election of Members) Order, 1958 paras 49 64 (1) (g) and 64 (2)*

A ballot paper is not liable to be rejected simply because it is marked on the back only If the symbols are distinctly visible on the reverse and the mark placed thereon clearly indicates the candidate for whom the vote has been cast there is sufficient compliance with the provisions of the United Provinces Municipalities (Conduct of Election of Members) Order 1958 for a duly marked ballot paper

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SHARIF SINGH v. ELECTION TRIBUNAL, MUNICIPAL BOARD, ALIGARH

Civil Miscellaneous Writ No 3504 of 1958

The facts appear in the judgment

S N Durgeds and *K B L Gour* for the applicant

S G Khare for the opposite parties

MOOTHAM, C J —I agree that this petition must be dismissed The question is whether the five ballot papers which had been marked on the back are valid The circumstances in which the question arises are it is to be hoped, most unusual On the face of these ballot papers are printed four vertical columns headed respectively (in Hindi) Serial number, Names of candidates with party affiliation if any, Facsimile of symbols assigned and Space for marking On the back of the form is printed the number of the form and the instructions for voters In the case of each of these ballot papers with the doubtful exception of ballot paper no 140 the ink used for impressing on the face of the ballot paper the vertical and horizontal lines, the names of the candidates and the symbols has penetrated the ballot papers with the result that everything printed on the face of the ballot papers appears also on the back of it, although of course the order of the columns, the symbols and the names of the candidates are reversed The symbols are perfectly clear, but the names of the candidates cannot be read as each letter is reversed A literate voter would therefore, be able to distinguish between the front and the back of the form but an illiterate voter might well be in doubt

Now paragraph 43 of the U P Municipalities (Conduct of Election of Members) Order, 1953, provides that an elector shall make a mark on the ballot paper opposite the name of the candidate or each of the candidates for whom he intends to vote, and clause (g) of paragraph 64 (1) provides that the Returning Officer shall reject a ballot paper if no vote is recorded thereon The argument is that the phrase on the ballot paper means, and means only on the face of the ballot paper It is, therefore contended that as the electors in the case of these five ballot papers have marked their choice on the back, the ballot papers were rightly rejected by

the Returning Officer and ought not to have been counted by the Election Tribunal There is however, a presumption that every voter who applies for a ballot paper intends to vote for one or more candidates Each of the marks made on these five ballot papers is opposite the reversed symbol assigned to a candidate and I do not think that there can be slightest doubt with regard to the candidate or candidates for whom the elector was voting It is true that the marks made by the voters are not opposite the names of the candidates for the printing of these names being reversed is not legible But I understand that the whole purpose of assigning a symbol to a candidate is to substitute something easily recognizable by a voter who owing to his illiteracy is unable to read the names of the candidates The symbol in other words, must be treated as taking the place of the name For all practical purposes so far as illiterate voters is concerned a mark opposite an assigned symbol is a mark opposite a name and in the peculiar circumstances of this case I am of opinion that the mark made by the voter on the back of the ballot paper is a mark on the ballot paper within the meaning of paragraphs 43 and 64 of the 1958 Order I have some hesitation in holding that the Election Tribunal was right in counting the votes recorded on ballot paper no 140 but as the exclusion of this ballot paper would not affect the result the matter is not of importance

I agree with the order proposed by my brother

DAYAL J —This is a petition under Article 226 of the Constitution by Swarup Singh whose election to a seat for Scheduled Caste candidate on the Municipal Board Aligarh, was set aside by the Election Tribunal on the election petition filed by Champa Lal who had obtained the next highest number of votes Swarup Singh, according to the declaration obtained 1,255 votes and Champa Lal respondent no 2, 1 246 votes

One of the grounds on which the election of Swarup Singh was challenged was that twelve of the votes cast for Champa Lal were wrongly rejected by the Returning Officer and that he had wrongly counted one vote

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Dayal J.

cast for Swarup Singh as valid The Election Tribunal held in favour of Champa Lal that eleven of the rejected votes had been wrongly rejected and that one vote counted for Swarup Singh should be rejected In the result therefore, Champa Lal according to the Election Tribunal obtained 1 257 votes and Swarup Singh obtained 1 254 votes The Election Tribunal therefore, set aside the election of Swarup Singh and declared Champa Lal to be the duly elected candidate

Swarup Singh by this petition prays for the quashing of the order of the Election Tribunal

The learned counsel for the petitioner does not challenge the finding of the Tribunal about the wrong rejection of six votes, namely votes recorded on ballot papers nos 2994 148, 167, 3109, 218 and 3015 He has challenged the finding with respect to the other five ballot papers, namely nos 117, 140, 79, 3019 and 2607 The voters who voted on these ballot papers made the marks on the back of the ballot paper and not on the front and were probably led to do so because the symbols which were more prominent than the written names appeared clearly on the back of the ballot papers as well The Returning Officer rejected these ballot papers because the voters marked on the back side of the ballot papers The Election Tribunal did not consider it to be a good reason to reject it and the contention raised on behalf of the petitioner is that any mark made on the back of the ballot paper amounts to the non marking on the ballot paper by the voter It is not contended and could not have been successfully contended that the marks on the back side were not meant for the respondent Champa Lal The questions of law for determination in the case are whether such a marking on the back of the ballot paper is against the directions contained in paragraph 43 of the U P Municipalities (Conduct of Election of Members) Order, 1958 as amended up to 3rd January, 1958 and whether such a ballot paper would be covered by sub clause (g) of clause (1) of paragraph 64 of the aforesaid Order

I do not consider such marking in this particular case to be marking against the provisions of paragraph 43

This paragraph directs the voter to make a mark on the ballot paper opposite the name of the candidate for whom he intends to vote To ascertain the candidate the ballot paper mentions the name and also depicts the symbol allotted to that particular candidate The symbol was clearly visible on the back of the ballot paper The name was not In the circumstances marking on the back of the ballot paper cannot be said to be against this direction I do not agree with the contention for the petitioner that the direction to mark on the ballot paper amounts to a direction to mark on the face of the ballot paper and that it is the face of the ballot paper alone which is really the ballot paper The entire sheet of paper is the ballot paper, of course one side of it is the face of the ballot paper and the other is the back side of the ballot paper

Paragraph 64 clause (1) mentions seven grounds for either or more of which the Returning Officer is bound to reject a ballot paper The only ground relied upon by the petitioner in justification of the Returning Officer s rejecting these votes is the ground mentioned in sub clause (g) That ground is that the Returning Officer shall reject a ballot paper if no vote is recorded thereon When a voter has made marks on the ballot paper though on the back side it cannot be said that no vote has been recorded on that ballot paper I am, therefore of opinion that the Returning Officer could not validly reject these ballot papers on the ground mentioned in sub clause (g) No other ground mentioned in clause (1) affects the present case

Clause (2) of paragraph 64 really deals with the rejection of a ballot paper on which a mark indicating the vote has been placed This clause is

> A vote recorded on a ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given

The proviso to this clause is not relevant for the purpose of the case A ballot paper on which a vote is

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recorded can be rejected only if the Returning Officer is unable to make out as to which candidate the vote has been given There could be no case of a doubt in the present case as for whom the vote has been cast The votes had been cast for Champa Lal as they were marked opposite his symbol These ballot papers therefore could not have been rejected in view of the provisions of clause (2)

We were referred to the notes in paragraph 240, p 140 Volume 14 Halsbury's Laws of England, Third Edition The note is

> A ballot paper marked on the back only should not be counted even though the marks shows through the paper on to the front A ballot paper marked both on the back and on the front may however be counted

These short notes however do not indicate on what provisions of law such an interpretation was placed and therefore this reference of these notes is not of help to the petitioner when the provisions of clause (2) of paragraph 64 are so clear

For the reasons stated above I am of opinion that this petition has no force I would accordingly reject it with costs

By the Court—The petition is dismissed with costs

The interim order of stay granted by this Court on the 26th November, 1958, is discharged

Petition dismissed

APPELLATE CIVIL

Before Mr Justice Gurtu and Mr Justice Dwivedi

BAIJNATH SINGH AND ANOTHER (PLAINTIFFS)

v

THE OUDH TIRHUT RAILWAY (DEFENDANT)

1959

August 6

Workmen and employer—*Claim for compensation—Oudh Tirhut Railway through its General Manager, whether employer for purposes of a claim by the railway servant—Workmen's Compensation Act, 1923 ss 2 and 10—Code of Civil Procedure 1908 s 79*

Having regard to the scheme of and the definitions under the Workmen's Compensation Act it seems explicit that a claim by or on behalf of a railway servant against the Railway through its General Manager is a claim against the employer and is maintainable as such A claim to enforce the employer's liability under s 8 of the Act cannot be said to be a suit under the Code of Civil Procedure so as to attract and be defeated by the provisions of s 79 of the Code *Chandra Mohan v Union of India* (1) considered

First Appeal From Order No 38 of 1952 from an order of S N Tripathi, Commissioner for Workmen's Compensation, Gorakhpur, dated the 29th of March, 1949 in Miscellaneous No 4/1

The facts appear in the judgment

Jagdish Swarup and *Hari Swarup* for the appellants

Brij Lal Gupta for the respondent

The judgment of the Court was delivered by—

GURTU, J —The appellants before us are the minor sons of Ram Lal Singh They filed a claim for compensation under section 10 of the Workmen's Compensation Act 1923 before the Commissioner for Workmen's Compensation appointed under the said Act Their statement of claim was registered as Miscellaneous Application no 2 of 1948

The claimants alleged that their father was employed as S P W I in the service of the Oudh Tirhut Railway at Sahjanwa Railway Station and that he died on 18th March 1947 from an accident resulting from collision of a light engine with a trolly which he was plying to measure the creep from Gorakhpur Then the claim

(1) A I R 1953 All 193

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Gulte J.

set out the details of the accident and stated that the claimants were the minor sons of the deceased and wholly dependent on him and that the family had heavily suffered for which legitimate compensation was due to the dependents and the members of the family They stated that a claim for compensation made to the Railway had been rejected and they claimed a sum of Rs 8 500 by way of compensation The cause title of this miscellaneous application no 2 of 1948 showed the Oudh Tirhut Railway through its General Manager residing in Railway Quarters Gorakhpur as the opposite party A written statement was filed by the opposite party the Oudh Tirhut Railway through the General Manager We are not concerned with the other pleas in this written statement except plea no 14 which runs as follows

> That the defendant does not represent the railway owned by the State for the purposes of the civil suit

We would like to add that the written statement admitted that the appellants father B Ram Lal Singh was employed as a S P W I ' in the service of the Oudh Tirhut Railway

Upon the pleadings of the parties the Commissioner for Workmen s Compensation framed several issues Issue no 4 was in the following terms

> Can a suit under section 3 of the Workmen s Compensation Act be brought against the General Manager, Oudh Tirhut Railway, without impleading the Governor General

The Commissioner for Workmen s Compensation by his order dated 29th March, 1949, found that the applicants were entitled to a compensation in the sum of Rs 3,500 but he dismissed the claim nonetheless upon the ground that the suit was not brought against the Governor General, who was the employer, as it should have been under the Workmen s Compensation Act but was brought against the General Manager of the named railway who was not the employer He was of the view that the General Manager Oudh and Tirhut Railway,

could not be considered either as the employer or as the managing agent of the employer the Central Government and since the Oudh and Tirhut Railway was owned by the Central Government for that reason in his view the application for compensation should have been filed against the Governor General He took the view that since the Governor General was not a party the application could not succeed He was of the view that the application could be brought against the General Manager only if it were proved that the General Manager was the managing agent of the Oudh and Tirhut Railway and that the onus of proving this lay on the applicants and he pointed out that between the Governor General and the General Manager there are other persons managing the railway namely the Railway Member of the Government and the Railway Board Members and there could be only one Managing Agent He was of the view that the Managing agent must have all the powers of the Central Government delegated to him and that there was nothing on the record to show that the General Manager, Oudh and Tirhut Railway had all such powers which the members of the Railway Board have Finally he came to the conclusion that as the General Manager could not be considered to be the managing agent of the Central Government so no relief could be granted as the opposite party impleaded in the application was not the employer of Ramlal Singh deceased

This first appeal from order has been filed by the claimants before this Court under section 30 of the Workmen s Compensation Act It is contended that the claim was properly preferred against the Oudh Tirhut Railway through its General Manager and that the Oudh Tirhut Railway through its General Manager was the proper person to be impleaded as the employer of Ramlal Singh, father of the claimants Arguments ancillary to the above submissions were also made with which we will deal later on It now becomes necessary in order to adjudicate upon the rival contentions to examine certain provisions of the Workmen s Compensation Act, 1923 (Act no VIII of 1923) It is an Act to

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Gurbi J

provide for payment by certain class of employers to their workmen of compensation for injury by accident Employer is defined by sub section (e) of section 2 of the Act as follows

> employer includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer and when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship means such other person while the workman is working for him,

Managing agent is defined by sub section (f) of section 2 as follows

> Managing agent means any person appointed or acting as the representative of another person for the purpose of carrying on such other person s trade or business but does not include an individual manager subordinate to an employer

Workman is defined by sub section (n) of section 2 as follows

> workman means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employers trade business) who is—
>
> (i) a railway servant as defined in section 3 of the Indian Railways Act 1890, not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or
>
> (ii) employed on monthly wages not exceeding four hundred rupees in any such capacity as is specified in Schedule II

Sub section (2) of section 2 of the Act enacts as follows

> (2) The exercise and performance of the powers and duties of a local authority or of any department

(acting on behalf of the Crown) shall for the purposes of this Act unless a contrary intention appears be deemed to be the trade or business of such authority or department

Chapter II of the Act deals with Workmen s Compensation and sets out the employers liability for compensation Section 4 of the Act regulates the amount of compensation and section 5 regulates the method of calculating wages We need not deal with the other sections which follow until we come to section 10 which is a section dealing with the notice of claim

Sub section (1) thereof runs as follows

> 10 (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within one year of the occurrence of the accident or in case of death, within one year from the date of death

It is not necessary for the purposes of the discussion in hand to quote the rest of section 10 of the Act Chapter III contains section 19 of the Act which says that if any question arises in any proceedings under the Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement be settled by a Commissioner Sub section (2) of section 19 states that no civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled decided or dealt with by a Commissioner or to enforce any liability incurred under this Act Then there are sections which deal with the appointment of Commissioners and other ancillary matters We then come to section 3 of the Act which states that the Commissioner shall have all the powers of a civil court under the Code of Civil Procedure 1908 for the purpose of taking evidence on oath (which such Commissioner is

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BALNATHI SINGH v. THE OUDH TIRHUT RAILWAY

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hereby empowered to impose) and of enforcing the attendance of witnesses and compelling the production of documents and material objects and the Commissioner shall be deemed to be a civil court for all of the purposes of section 195 of Chapter XXXV of the Code of Criminal Procedure 1898 Under section 30 of the Act an appeal is provided to the High Court from the *inter alia* an order disallowing a claim in full or in part for a lump sum The right of appeal under section 30 (1) (*a*) of the Act is restricted by a further provision that a substantial question of law should arise in the appeal There are other restrictions which are not relevant for our purpose The period of limitation for making a claim is also fixed at 60 days

From the provisions of section 19 (2) of the Act it will be observed that the question of compensation under the Act has been taken out of the jurisdiction of the civil courts except in the matter of appeal A special authority is created under section 19 (1) of the Act namely the Commissioner The Act regulates the procedure and the practice to be followed before the Commissioner The Civil Procedure Code is applied only to a very limited extent and for certain specific purposes only The terms employer , Managing Agent and workman are all defined The term workman is also defined as including a railway servant What is preferred before the Commissioner according to the Act by a person desirous of compensation is a claim No plaint as such is filed It will thus be apparent that this Act creates special rights and provides a special machinery with its own law of procedure for the adjudication of rights which the Act creates The civil court only comes into the picture because of the provision for an appeal to the High Court The question which arises in this case is as to who was the employer of this railway servant We have already referred to the statement of claim and the reply and have pointed out that the claimants made an averment that their father was in the service of the Oudh and Tirhut Railway and this position was accepted in the written statement still the question is raised whether the General Manager of the Oudh and

Tirhut Railway or the Oudh and Tirhut Railway through its General Manager is the employer of the father of these claimants

We have already quoted the definition of the word employer It is to be noted that it is an inclusive definition and therefore the enumerated persons do not constitute the whole body of persons who may be considered to be employers The Commissioner for Workmen's Compensation has held that it has not been established that the General Manager was the Managing Agent within the definition of the word managing agent in the Act and he has pointed out that there are other bodies in between the Central Government and the General Manager the Central Government being the ultimate owner of the railway and thus the employer But the problem that we are examining we think, is resolved by the provisions of sub section (2) of section 2 of the Act which expressly state that the exercise and performance of the powers and duties of a local authority or of any department acting on behalf of the Government shall for the purposes of this Act unless a contrary intention appears, be deemed to be the trade or business of such authority or department Now, therefore, the only question which has to be considered is whether the Oudh and Tirhut Railway is a department acting on behalf of the Government and is responsible for the running of the Oudh and Tirhut Railway, if so, then the running of the railway will be deemed to be the business of the Oudh Tirhut Railway If the Oudh and Tirhut Railway constitutes a department of the Government or an authority in itself then the business carried on will be deemed to be its business and if as an authority or department it employed the claimants father then it will be considered to be the employer In the definition of a railway servant given in the Workmen's Compensation Act reference is made to the Indian Railways Act, 1890 We may, therefore usefully refer to the Indian Railways Act to find out what exactly is the position in this case in regard to the running of the Oudh and Tirhut Railway by the General Manager We find that section 3 sub section (6) of the Indian Railways Act, 1890 (Act no IX of 1890), defines railway administrat

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Gurtu J.

tion as railway administration or administration in the case of a railway administered by the Government means the Manager of the railway and includes the Government and in the case of a railway administered by a railway company means the railway company Section 4 (7) defines a railway servant as meaning any person employed by a railway administration in connection with the service of a railway It would thus appear that the Manager of the railway is the administration under the Indian Railways Act and the Manager is equated to the Government He can therefore, be said to be running the department which is directly concerned with the business of managing the railway Since under the definition given in the Railway Act he is put on the same footing as Government itself it may even be said that he satisfies the definition of managing agent given in the Workmen s Compensation Act In view of the definition of railway administration as given above he may be deemed to have all the powers of the Government necessary to the running of the business We have referred to the statement in the claim that Ram Lal Singh was in the service of the Oudh Tirhut Railway These allegations were not denied by the opposite party the Oudh Tirhut Railway Keeping in view the definition of employer given in the Workmen s Compensation Act which we have pointed out, is an inclusive definition and the definition is not limited to the enumerated kinds we do not see any reason why it should not be held in this case that the General Manager of the Oudh and Tirhut Railway was the employer of this particular railway servant, the father of the claimants We have regard also to the language of sub section (2) of section 2 of the Workmen s Compensation Act to which we have made a reference We think if ordinary persons were asked after being told the facts of this case the question as to who was the employer of the father of the claimants they would certainly answer the Oudh and Tirhut Railway through its General Manager We think it is a well settled proposition that in dealing with matters relating to the general public statutes are presumed to use words in their popular sense *ut loquitur vulgus* For authority

we need only invite attention to Maxwell on Interpretation of Statutes 1953 ed page 54 The authorities cited in support of the proposition are given at footnote (m) on page 54 It is not necessary to mention these cases specifically We think it is permissible also to refer in this connection to a dictionary meaning as given in the Shorter Oxford English Dictionary We have examined the meaning of the word employer and we find it to mean one who employs servants workmen etc for wages We have no difficulty in view of what we have said in coming to the conclusion that the claimants father was having regard to the definitions and the scheme of the Workmen s Compensation Act employed by the General Manager Oudh Tirhut Railway or by the Oudh Tirhut Railway through its General Manager We must we think construe this Act in such a way that its purpose will be fulfilled The Act relates to the question of compensation between employers and employees Most of the persons who would be entitled to the benefit of this Act are illiterate persons and so far as they are concerned when they enter into the service of a railway which is run by a General Manager they do not think that they are entering into the service of the Central Government but that they are taking up employment with the railway which for all practical purposes from their point of view functions as an independent authority or department No doubt there are officials further up in the hierarchy beyond the General Manager and there is no doubt of the ultimate ownership of the Central Government but the question is whether having regard to the provisions of section 2 sub section (2) of the Workmen s Compensation Act and the definition of employer as given in section 2 (1) (e) of the Act in all the circumstances it could be said that the employer in this case was the Oudh and Tirhut Railway through its General Manager There is no written contract between the Governor General and the late employee produced in this case We have no difficulty in answering the aforesaid question in favour of the appellants

We may now state that we were pressed in this case with a Full Bench ruling of the Assam High Court in

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GOSWAMI J.

the case of *Chandra Mohan Saha* v. *Union of India* (1) That was a case in which a claim was made under section 80 of the Indian Railways Act for compensation and the opposite party impleaded was not the railway itself through its General Manager, but was the Union of India The contention advanced was that the Railway through its General Manager should have been impleaded and that the suit should fail because of non joinder and reliance was placed on rule 13 Order I, Civil Procedure Code

Section 80 of the Indian Railways Act lays down that a suit for compensation for injury to through booked traffic has to be filed against the railway administration on whose railway the injury has occurred In the Assam case compensation was claimed under that section and the argument advanced was that the suit had to be filed against the railway administration and not against the Union of India

For the purpose of this argument the definition of railway administration as given in the Railways Act was pressed and it was said that the railway administration meant the General Manager of the railway That argument was countered by the Bench by pointing out that the word railway administration as defined in the Railways Act included the Government or the State and then it was said that a suit which was aimed at seeking a relief as against the Government had to be filed in accordance with the provisions of the Civil Procedure Code and that section 79 of the Civil Procedure Code clearly indicates that in a suit by or against the Government the authority to be named as plaintiff or defendant as the case may be shall be (*a*) in the case of a suit by or against the Central Government--the Union of India and (*b*) in the case of a suit by or against a State Government--the State It was argued in reply that section 80, Railway Act, requires service of notice on the General Manager of the Railway in the case of a suit against the Central Government, but it was said that only a notice was required to be delivered to the

(1) A I R 1953 Ass 193

General Manager, but a suit if it sought a relief against the Government had to be filed in accordance with section 79 of the Code and it was the view of the Bench that section 79 of the Civil Procedure Code and section 80 of the Railway Act were no way in conflict because the railway administration under the definition given in the Railways Act included the Government It was however, pointed out that if the plaint failed to establish a cause of action against the Central Government a suit would fail In the end the Bench was of the view that it was not necessary to implead the particular railway through its General Manager and the suit was not bad for non joinder

Now it may be pointed out at once that the present claim is in no way a suit under the Civil Procedure Code It is merely a claim which is initiated by an ordinary petition and not by a plaint and it is initiated before a Commissioner who is not a civil court We have already indicated that the Civil Procedure Code is applied only to a limited extent by section 30 of the Workmen s Compensation Act This claim moreover is also not a claim under the Railways Act at all and therefore section 80 of the Railways Act is immaterial Also because of what we have indicated section 79 of the Civil Procedure Code is not attracted We do not, therefore, think that the case of the Assam High Court compels us to hold that the claim for compensation should have been against the Central Government and that it was made against the wrong person However if in their claim the claimants had made out that their deceased father was an employee of the Central Government then of course the position would have been different, but the allegation specifically is that his employer was the Oudh and Tirhut Railway through its General Manager We think that the court below erred in coming to the conclusion that the claim preferred must fail because the Oudh and Tirhut Railway through its General Manager was not the employer, but the Central Government The consequence must be that the appeal is allowed and in terms of the findings

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recorded by the Commissioner for Workmen s Compensation by the order under appeal, the claim made in the miscellaneous application filed before him must stand decreed to the extent of Rs 3,500 The costs of this appeal will be paid by the railway to the appellants

Appeal allowed

APPELLATE CIVIL

*Before Mr Justice Nigam**

BASANT LAL SHAH (DEFENDANT)

v

SHRIMATI TARAWATI SHUKLA (PLAINTIFF)

1959

Act XI 28

Landlord and Tenant —*Permission to file a suit for ejectment by the Rent Control and Eviction Officer—Revision—Remand —District Magistrate, delegation of powers—Authorization General or Special United Provinces Rent Control and Eviction Act 1947 s 2(d) scope of*

Held that the District Magistrate in s 2(d) of United Provinces Rent Control and Eviction Act 1947 means that the District Magistrate may authorize any officer to perform his functions under the Act but while the District Magistrate may authorize some other officer to perform his functions under the Act he himself all the time retains the powers to exercise his functions and the District Magistrate will also have the power to withdraw any case from the file of the officer who has been authorized by him The authorization may be general or special and the language of the section 15 is consonant with special authorization in respect of any particular case and is not restricted to a general authorization *Dwarka Prasad v Central Taxes Collectorganj, Kanpur* (1) considered

Second Appeal No 324 of 1958 from a decree of Ram Surat Singh, Second Civil and Sessions Judge, Lucknow, dated 4th March, 1958

The facts appear in the judgment

H L Verma for appellant

Jagdish Narain for respondent

*Sitting at Lucknow

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NIGAM, J.—Smt. Tarawati filed Regular Suit no. 285 of 1956 in the court of Munsif South, Lucknow, against Sri Basant Lal Shah seeking a decree for ejectment and arrears of rent. The suit was contested and on the pleadings of the parties the learned Munsif framed the following issues:

(1) Whether the permission was obtained by fraud as alleged?

(2) Whether the Additional City Magistrate II had jurisdiction to give permission to sue for ejectment?

(3) To what relief, if any, is the plaintiff entitled?

He answered Issue no. 1 in the negative and Issue no. 2 in the affirmative. In the event he decreed the suit for ejectment and for recovery of Rs. 260 with costs against the defendant. Against that judgement and decree the defendant Sri Basant Lal Shah preferred an appeal before the District Judge, Lucknow. This appeal was heard by the learned Civil (II Civil and Sessions) Judge, Lucknow, who by his Judgment dated 4th March, 1958, dismissed the appeal and maintained the order of the learned Munsif with the modification that he set aside the decree for arrears of rent in consideration of certain deposits having been made under section 7 (c) of U. P. Act III of 1947. Now the defendant Sri Basant Lal Shah has come up in second appeal. I have heard the learned counsel for the appellant.

Only one point has been urged before me. The contention of the learned counsel is that the Additional City Magistrate II had no jurisdiction to grant any permission. The plaintiff had filed an application for permission to file a suit for ejectment against the defendant-appellant. This application was disposed of by the Rent Control and Eviction Officer, Lucknow, by his order, dated 20th August, 1954. The permission was refused. Against that refusal a revision was preferred to the Commissioner, Lucknow Division. This revision was disposed by the Additional Commissioner

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BASANT LAL SHAH v. SHRIMATI TARAWATI SHUKLA

Nigam J

Rohilkhand Lucknow Divisions, by his order dated 18th January 1955 The operative portion of the order reads

> I would hence allow this revision application, set aside the order passed by the learned Rent Control and Eviction Officer and remand the case back to him for deciding it afresh after considering all the evidence available on the record and after allowing the parties an opportunity to be heard The learned Deputy Commissioner Lucknow, is requested to get the application disposed off by some officer other than the one who has expressed his opinion in the matter

It is common case of the learned counsel that this order is not happily worded Apparently the intention of the learned Additional Commissioner was that as the Rent Control and Eviction Officer had expressed his opinion in the previous order, dated 20th August 1954, it was desirable in the interest of justice to get the matter decided by some other officer In the circumstances the proper order to pass was to remand the case not to the previous officer but to the District Magistrate and to permit him either to decide the case himself or to authorize some other officer to consider the application under section 3 of Act III of 1947

The language used by the Additional Commissioner has given rise to all these arguments As the learned Additional Commissioner worded his order to indicate that he was remanding the case to the Rent Control and Eviction Officer with a request to the Deputy Commissioner i e the District Magistrate Lucknow, to get the case disposed of by some other officer I take the order to be only one of remand and a plain request to the District Magistrate

Subsequently the District Magistrate did pass an order a copy of which is Ex 5 on the record This order reads

> This case will be tried and heard by Sri Sharma J A S, A C M II and disposed of by him
>
> (Sd) S N M TRIPATHI
>
> 31 1 55

The first contention of the learned counsel is that the District Magistrate had no authority to pass any such orders I am unable to agree with this suggestion District Magistrate is defined in section 2 (*d*) of U P Act III of 1947 as including an officer authorized by the District Magistrate to perform any of his functions under this Act This means that the District Magistrate may authorize any officer to perform his functions under the Act That means that the District Magistrate has been authorized to delegate his powers But delegation does not mean divestment It, therefore necessarily follows that while the District Magistrate may have authorized some other officer to perform his functions under the Act he himself all the time retains the powers to exercise his functions The necessary corollary is that the District Magistrate will also have the power to withdraw any case from the file of tha officer who had been authorized by him This also follows from the fact that powers had been delegated by the District Magistrate and he is normally presumed to have also the power to cancel that delegation That power must be taken to be inherent in the District Magistrate who had the power to confer authority and therefore also had the power to withdraw that authorization

The next contention of the learned counsel is that the District Magistrate has no power to entrust any particular case to any particular officer The learned counsel relies on the view taken by DAYAL, J in *Dwarka Prasad* v *Central Talkies, Collectorganj, Kanpur* (1) Dealing with the point in paragraph 9 of his judgment the learned Judge stated

> even if such an order of transfer could be deemed to imply the District Magistrate s deliberate authorization of another officer to perform the District Magistrate s functions under the Act, such an order is not probably contemplated by s 2 (*d*) of the Control of Rent and Eviction Act This provision does not empower the District Magistrate,

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Nasim J.

to authorize any particular officer to try any or any class of cases which was made over by the District Magistrate to such officer

This provision contemplates a District Magistrate's authorizing an officer to perform any of the District Magistrate's functions under the Act It follows therefore that the order of authorization should be of a general kind either with respect to all the functions of the District Magistrate under the Act or with some of them The order should not be just restricted to one particular case

I consider it a misfortune to be unable to agree with the learned Judge It appears to me that there is no justification for putting a narrow or a restricted meaning on the provisions of law Section 2(d) merely defines the term District Magistrate It says that the term includes an officer authorized by a District Magistrate It makes no reference to the authorization being general or special Where the law does not envisage any restriction I would consider it improper for the courts to add any restriction to the language of the provision That would be legislation and not interpretation The function of the courts must be strictly limited to interpretation The plain meaning must be adhered to unless there is a confusion or doubt created by the language used by the legislation In this particular section the term District Magistrate is to include an officer authorized by the District Magistrate to perform any of his functions under this Act Now the term any function may relate to functions in respect of a case or any particular kind of functions generally There is no reason why only one meaning should be attached to the term I am, therefore, of opinion that the language of the section is consonant with special authorization in respect of any particular case and is not restricted only to a general authorization I find support for my view in the opinion expressed by BRIJ MOHAN LAL, J in the same case Unfortunately there was no reference to a third Judge and there is no other Division Bench ruling on this point

The next contention of the learned counsel is that the District Magistrate passed his order, copy of which is Ex 5 as a routine order without being conscious of the facts that were involved I am unable to see any point in this contention It is again true that the contention of the learned counsel finds support in the view taken by R DAYAL, J in the case cited above I am however of opinion that cases of transfer of particular cases under section 3 of Act III of 1947 were not so common that there could be any possibility of a routine order having been passed without attention to the facts of a particular case The learned counsel has himself conceded that the selection of the officer to whom the case was transferred must have been a deliberate selection made by the District Magistrate There is also the presumption of section 114 of the Indian Evidence Act available in respect of official acts There is no reason to suspect that this particular official act was performed either negligently or without due care and caution It should not be necessary to insist on the order indicating the District Magistrate s reasons for the order and thereby compelling him to write longer orders so that the courts may be in a position to decide that the order had been passed after due consideration of the facts of a particular case There is a presumption available under the law and there is no reason to suspect that the act was not done with all due care and caution I am, therefore, of opinion that it must be held unless the contrary is proved that the District Magistrate did perform his functions with full knowledge of the facts involved It is not necessary to add that in the particular case there is no evidence to indicate the contrary

No other point has been pressed I therefore, see no force in this second appeal and dismiss it There will be no order as to costs in view of the point of law involved Stay order, dated 28th November 1958, is discharged

Appeal dismissed

CIVIL REFERENCE

*Before Mr Justice V D Bhargava and Mr Justice Misra**

THE LAKSHMI SUGAR AND OIL MILLS LTD (APPLICANT)

v

STATE (OPPOSITE PARTY)

1959
August 28

Agricultural Income tax—*Company claiming deductions as staff salary—Accounts filed—Deductions allowed by the assessing officer—Revision to the Board—Reduction of the staff salary—Board jurisdiction of—U P Agricultural Income Tax Act 1948 s 15(3) and Ind an Income Tax Act 1922 s 25(3) scope of—*

The company in compliance with a notice under s 15(3) of the United Provinces Agricultural Income Tax Act furnished accounts on 12th September 1950 claiming deductions to the extent of Rs 26 680 12 These deductions were allowed by the assessing officer but on revision to the Board by the State the Board reduced the amount of the staff salary to Rs 7 188 15 although the assessing officer allowed a deduction of Rs 11 488 15 on account of the staff salary Against this order of the Board the reference has been filed under section 24 of the U P Agricultural Income Tax Act

Held that there being no material or evidence before the Board it had no power or jurisdiction to disallow any part of the deductions claimed as staff salary by the company *Dhakuriah Jute Cotton Mills Ltd v Commissioner of Income tax West Bengal* (1)

Gurmukh Singh v Commissioner of Income tax Lahore (2) relied on

Civil Reference No 6 of 1957 made by Agricultural Tax Revision Board, U P, Allahabad, by his order, dated 15th March, 1957

The facts appear in the judgment

S C Das for the applicant

Standing Counsel Sri Kesri Bir Pd holding brief for opposite party

*Sitting at Lucknow

(1) A I R 1955 S C 65 (2) A I R 1944 Lah 353

The judgment of the Court was delivered by—

V D BHARGAVA J —This is a reference under section 24 of the U P Agricultural Income Tax Act This Court had directed the Revision Board to state a case on the following question

> Whether the Board has any power to disallow any part of the amount shown by the company in its return of income in respect of salaries of its staff if so did the Board have any material upon which to hold that the salaries of the staff paid in the previous year amounted to Rs 7 488 15 ?

The facts of the case appear to be that the assessee is a joint stock company run under the name and style of The Lakshmi Sugar and Oil Mills Ltd Hardoi , and the dispute relates to the assessment year 1358 Fasli The return was submitted by the company and a notice under section 15 (3) of the Act was issued and served on the Manager of the company and in compliance with that notice accounts were furnished by the company on the 12th September 1950 According to the return the income mentioned therein was Rs 27 542 9 and the deductions claimed under different heads amounted to a sum of Rs 29 796 12 So far as the income was concerned it was not accepted by the assessing officer on the ground that according to the report of the patwari and according to Government calculations the income should have been Rs 34,516 3 3 and since no details of the income had been supplied therefore the assessing officer treated the income as Rs 34,516 3 3

As igards the deductions the assessing officer accepted practically all the deductions except a few and allowed a total deduction of Rs 26 630 12 and the assessment was made on a net income of Rs 7,885 7 5

There was a revision filed by the assessee under section 22 of the Act and also an application in revision on behalf of the State The application in revision of the assessee was dismissed but the revision of the State was partly allowed The assessing officer had allowed a deduction of a sum of Rs 11,488 15 on account of the staff salary

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V. D. Bhargava J.

This amount was reduced by the Board in the revision by the State to a sum of Rs 7,488 15 The order by which this amount was reduced was in the following words

> We however find ourselves unable to uphold the deduction of Rs 11 488 15 allowed on account of staff salaries The area of the farm is not more than 1 000 acres In the return the details of the staff salaries were not given There were no accounts in respect of income before the assessing authority and we fail to understand how he accepted the amount alleged to have been incurred on account of salaries when the income as shown in the return was Rs 27 542 9 only We reduce the amount of staff salaries to Rs 7,488 15

Learned counsel for the applicant has argued that this cut in the deductions was not based on any evidence or material before the Board and it was not within the jurisdiction of the Board to reduce the amount in such an arbitrary manner and he placed reliance on *Dhakeshwari Cotton Mills, Ltd v Commissioner of Income tax, West Bengal* (1) It was contended by learned counsel for the appellant in the Supreme Court that the returns had been submitted by the company of that case but the assessing officer had increased the income without any material or evidence being before him The reasons given for the increase were in the following words

> From the point of view of profits 1943 was a very good year if not the best, for all cotton mills Expenses on cotton and fuel show that production was undoubtedly higher whereas it is found that the gross profit by this company is low I conclude that full amount of sales have not been accounted for It is expected that actually the rate of gross profit should have been higher this year In view of the higher costs of establishment I take it that the rate of about 40 per cent, i e near about the rate disclosed in 1942 accounts should have been

(1) A I R 1955 S C 65

maintained I add back Rs 36 lakhs for unaccounted sales

Against this order of the Income tax Officer there was an appeal and the matter went to the appellate court On appeal, this order was upheld by the Assistant Commissioner The Appellate Tribunal when the appeal was before it requested the departmental representative to produce for extra examination of the Income tax Appellate Tribunal the gross profit rates shown or assessed in the cases of other similar cotton mills The assessee was also similarly asked to produce within three or four days time information regarding the gross profit rates shown or assessed by other similar cotton mills The income tax authorities produced certain data about which no information was given to the assessee and when the assessee s counsel had gone to give the details, the Tribunal refused to accept them and the counsel was told that it was not fair to the other side to take notice of any additional evidence or record at that stage Considering all the facts the Appellate Tribunal came to the following conclusions

> We have however, considered all facts relevant to this case and are of the opinion that the addition to the sales should be reduced from Rs 36 lakhs made by the Income tax Officer to Rs 16 lakhs which would reduce the gross profit rate to about 35 percent

The matter came up before the High Court, but the High Court refused to interfere and thereafter there was a special appeal to the Supreme Court Their Lordships of the Supreme Court referred to a Full Bench case of the Lahore High Court in *Gurmukh Singh* v *Commissioner of Income tax, Lahore* (1) and while dealing with that case their Lordships observed

> that while proceeding under sub section (3) of section 23 the Income tax Officer though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make

(1) A I R 1944 Lah 353

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V D Bhargava J

an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to found that estimate and that in that case he proposes to use against the assessee the result of any private enquiries made by him he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it

and ultimately they held in that case

We are in entire agreement with the learned Solicitor General when he says that the Income tax Officer is not fettered by technical rules of evidence and pleadings and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends because it is equally clear in making the assessment under sub section (3) of section 23 of the Act the Income tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all There must be something more than bare suspicion to support the assessment under section 23 (3)

They further held

The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of *Gurmukh Singh* v *Commissioner of Income tax Lahore* (1)

They further based their judgment on the principle of fundamental rules of justice It was observed

In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions Firstly it did not disclose to the assessee what information had been supplied to it by the departmental representative Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly it declined to take all the material

(1) A I R 1944 Lah 352

that the assessee wanted to produce in support of its case

There is also a case of this Court in *Gopinath Nath* v *Commissioner of Income tax* (1) There also a question arose about the scope and powers of the Income tax Officer under section 23 (3) and there being difference of opinion between Hon NIAMATULLAH, J and Hon BAJPAI, J the question was referred to Hon SULAIMAN, C J who agreed with the view of Hon NIAMATULLAH, J In that case they have pointed out the difference between section 23 (3) and section 23 (4) i e an assessment which is made after the return has been filed and accounts are not accepted on the one hand and on the other the assessment on the basis of the best judgment It was held

> There is an essential difference between cases in which action is taken under section 23 (3) and those under section 23 (4) Where the Income tax Officer acts under section 23 (2) the assessment must be based on evidence If the evidence adduced by the assessee is not accepted or if the assessee does not produce any evidence, the Income tax Officer must have recourse to other evidence on which to base his assessment and for this purpose he has ample powers under section 37 to call for evidence The word used is evidence and not some other word like information The evidence may not be such as fulfils all the technical requirements as to admissibility relevancy, etc of the Evidence Act, but mere conjecture surmise or assumption of a fact does not amount to evidence within the meaning of section 23 (3) *Prima facie* the evidence should be taken in the presence of the assessee or within his knowledge in order that he may be able to meet such evidence The result of private inquiries made in the absence of and without notice to the assessee is certainly not evidence within the meaning of section 23 (3)

Thereafter they discussed the scope of section 23 (4)

(1) (1936) I L R 58 All 203

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THE LAKSHMI SUGAR AND OIL MILLS LTD v STATE

V D Bhargava J

The present case under the Agricultural Income tax Act is analogous to the powers which are to be exercised by the assessing authority or the appellate authority under section 23 (3) of the Income Tax Act

In the case of *Dhakeshwari Cotton Mills Ltd* v *Commissioner of Income tax* (1), there were certain reasons given by the assessing officer for increasing the income, but in the present case we find that practically no reasons at all have been given There is no mention of any material information or evidence on the basis of which any modification was sought in the deductions In the circumstances it was not within the jurisdiction of the Board to arbitrarily reduce the amount from Rs 11,488 15 to Rs 7,488 15 it was a pure guess or surmise that since the farm was of 1 000 acres therefore the expenses should be Rs 7 488 15 Notice under section 15 (3) had been served on the assessee and in pursuance thereof accounts were furnished There is mention of the accounts having been before the assessing officer though not specifically whether the details of the salaries paid to the staff were before him or not but if the accounts were before the assessing officer the details must have been before him and if he was satisfied that the amount claimed by the assessee was the correct amount, it was not within the jurisdiction of the Board to vary that amount without any evidence or material being before it

We would therefore answer the question as follows

> There being no material or evidence before the Board the Board had no power or jurisdiction to disallow any part of the deductions claimed by the company

The assessee is entitled to his costs which we assess at Rs 100 We also assess the costs of the State at Rs 100

Reference answered

(1) A I R 1955 S C 65

SUPREME COURT
APPELLATE CRIMINAL

Before Mr Justice Iman and Mr Justice Wanchoo

VISHWANATH

v

STATE OF UTTAR PRADESH

1959

5 November
8

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Indian Penal Code 1860 s 100 cl (v)—*Right of private defence of body—Assault with the intention of abducting—Interpretation of Statutes—Abducting meaning of*

By s 100 Indian Penal Code the right of private defence of body extends to the voluntary causing of death where an assault is made with the intent of abducting

Where an assault was made on the appellant s sister by her husband who compelled her by force to go away from her father s house and the appellant inflicted one injury with knife on the assailant which however killed him the High Court convicted the appellant under s 304 Part II Indian Penal Code holding that the right of private defence of body under s 100 cl (v) Indian Penal Code was not available to the appellant as the word abducting used there referred to such abducting as is an offence under the Code and not the mere fact of abduction as is defined under s 362 thereof

On an appeal to the Supreme Court *Held* that on a plain reading of s 100 cl (v) Indian Penal Code the word abducting used there means the mere act of abduction as defined under s 362 of the Code and does not refer to such abduction as is an offence under s 364 onwards of the Code An assault having been made on the appellant s sister with the intention of abducting her the appellant was entitled to the right of private defence of body under s 100 cl (v) Indian Penal Code

Held further that the appellant did not inflict more harm than was necessary

The appeal accordingly was allowed and the appellant acquitted

Emperor v Ram Sanja (1) reversed

Criminal Appeal no 32 of 1958 from an order of the Allahabad High Court dated the 26th April, 1957, in Criminal Appeal no 992 of 1954

The facts appear in the judgment

(1) I L R (1948) All 165

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S P Sinha, Senior Advocate (*S D Sekhri*, Advocate) with him for the appellant

G C Mathur and *C P Lal* Advocates for *G N Dikshit*, Advocate for the respondent

The following judgment of the Court was delivered by—

WANCHOO J —This is an appeal by special leave against the judgment of the Allahabad High Court in a criminal matter The facts of the case, as found by the High Court are no longer in dispute and the question that is raised in this appeal is whether the appellant had exceeded the right of private defence of person The relevant facts for our purposes are these Gopal deceased was married to the sister of the appellant The appellant and his father Badri were living in a railway quarter at Gorakhpur Gopal s sister was married to one Banarsi, who was also living in another railway quarter nearby Gopal had been living for some time with his father in law They did not however pull on well together and Gopal shifted to the house of Banarsi Badri persuaded Gopal to come back to his house but the relations remained strained and eventually Gopal shifted again to the quarter of Banarsi about 15 days before the present occurrence which took place on 11th June, 1955 at about 10 p m Gopal s wife had continued to live with her father as she was unwilling to go with Gopal Her father Badri and her brother Vishwanath appellant sided with her and refused to let her go with Gopal Gopal also suspected that she had been carrying on with one Moti who used to visit Badri s quarter Consequently Gopal was keen to take away his wife, the more so as he had got a job in the lace department some months before and wanted to lead an independent life On 11th June there was some quarrel between the appellant and Gopal about the girl but nothing untoward happened then and the appellant went back to his quarter and Gopal went away to Banarsi s quarter Gopal asked Banarsi s sons to help him in bringing back his wife Banarsi also arrived and then all four of them went to Badri s quarter to bring back the girl On reaching the place Banarsi and his two sons stood outside while Gopal

went in. In the meantime Badri came out and was asked by Banarsi to let the girl go with her husband. Badri was not agreeable to it and asked Banarsi not to interfere in other people's affairs. While Badri and Banarsi were talking Gopal came out of the quarter dragging his reluctant wife behind him. The girl caught hold of the door as she was being taken out and a tug of war followed between her and Gopal. The appellant was also there and shouted to his father that Gopal was adamant. Badri thereupon replied that if Gopal was adamant he should be beaten (*to maro*). On this the appellant took out a knife from his pocket and stabbed Gopal once. The knife penetrated into the heart and Gopal fell down senseless. Steps were taken to revive Gopal but without success. Thereupon Gopal was taken to the hospital by Badri and the appellant and Banarsi and his sons and some others but Gopal died by the time they reached the hospital.

On these facts the Sessions Judge was of opinion that Badri who had merely asked the appellant to beat Gopal could not have realised that the appellant would take out a knife from his pocket and stab Gopal. Badri was therefore acquitted of abetment. The Sessions Judge was further of opinion that the appellant had the right of private defence of person and that this right extended even to the causing of death as it arose on account of an assault on his sister which was with intent to abduct her. He was further of opinion that more harm than the circumstances of the case required was not caused and therefore the appellant was also acquitted.

The State then appealed to the High Court against the acquittal of both accused. The High Court upheld the acquittal of Badri. The acquittal of the appellant was set aside on the ground that the case was not covered by the fifth clause of section 100 and that the right of private defence of person in this case did not extend to the voluntary causing of death to the assailant and therefore, it was exceeded. The High Court relied on an earlier decision of its own in *Emperor v. Ram Saiya* (1). The

(1) I.L.R. [1948] All 165

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appellant was therefore convicted under section 304 Part II of the Penal Code and sentenced to three years rigorous imprisonment He applied for a certificate to enable him to appeal to this Court but this was refused Thereupon he applied to this Court for special leave which was granted and that is how the matter has come up before us

The main question therefore that falls for consideration in this appeal is whether the decision in *Ram Saiya's* case (1) is correct It appears that four other High Courts have taken a view which is different from that taken in *Ram Saiya's* case, namely *Jagat Singh* v *King Emperor* (2) *Daroga Lohar* v *Emperor* (3), *Sakhu* v *The State* (4) and *Dayaram Laxman* v *State* (5) There is however no discussion of the point in these four cases and we need not refer to them further The view taken in *Ram Saiya's* case (1) is that the word abducting used in the fifth clause of section 100 of the Penal Code refers to such abducting as is an offence under that Code and not merely to the act of abduction as defined in section 362 thereof Mere abduction is not an offence and therefore cannot give rise to any right of private defence and the extended right of private defence given by section 100 only arises if the offence which occasions the exercise of the right is one of the kinds mentioned in section 100

Section 97 gives the right of private defence of person against any offence affecting the human body Section 99 lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence Section 100 with which we are concerned is in these terms

> The right of private defence of the body extends, under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely—

(1) I L R [1948] All 165 (2) A I R 1923 Lah 155
(3) A I R 1950 Pat 347 (4) A I R 1951 Nag 349
(5) A I R 1955 M B 182

First—Such an assault as may reasonably cause apprehension that death will otherwise be the consequence of such assault

Secondly—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault

Thirdly—An assault with the intention of committing rape

Fourthly—An assault with the intention of gratifying unnatural lust

Fifthly—An assault with the intention of kidnapping or abducting

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release

The right of private defence of person only arises if there is an offence affecting the human body Offences affecting the human body are to be found in Chapter XVI from section 299 to section 377 of the Penal Code and include offences in the nature of use of criminal force and assault Abduction is also in Chapter XVI and is defined in section 362 Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place But abduction pure and simple is not an offence under the Penal Code Only abduction with certain intent is punishable as an offence If the intention is that the person abducted may be murdered or so disposed of as to be put in danger of being murdered section 364 applies If the intention is to cause secret and wrongful confinement section 365 applies If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or seduced to illicit intercourse or is likely to be so forced or seduced section 366 applies If the intention is to cause grievous hurt or so dispose of the person abducted as to put him in danger of being subjected to grievous hurt or slavery or to the unnatural lust of

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any person section 367 applies If the abducted person is a child under the age of ten and the intention is to take dishonestly any movable property from its person section 369 applies It is said that unless an offence under one of these sections is likely to be committed the fifth clause of section 100 can have no application On a plain reading however of that clause there does not seem to be any reason for holding that the word abducting used there means anything more than what is defined as abduction in section 362 It is true that the right of private defence of person arises only if an offence against the human body is committed Section 100 gives an extended right of private defence of person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein Each of the six clauses of section 100 talks of an assault and assault is an offence against the human body (See section 352) So before the extended right under section 100 arises there has to be the offence of assault and this assault has to be one of the six types mentioned in the six clauses of the section The view in *Ram Sanya's* case (1) seems to overlook that in each of the six clauses enumerated in section 100 there is an offence against the human body namely assault So the right of private defence arises against that offence and what section 100 lays down is that if the assault is of an aggravated nature as enumerated in that section the right of private defence extends even to the causing of death The fact that when describing the nature of the assault some of the clauses in section 100 use words which are themselves offences as for example grievous hurt rape, kidnapping wrongfully confining does not mean that the intention with which the assault is committed must always be an offence in itself In some other clauses the words used to indicate the intention do not themselves amount to an offence under the Penal Code For example the first clause says that the assault must be such as may reasonably cause the apprehension of death Now death is not an offence anywhere in the Penal Code Therefore when the word abducting is used in the fifth clause that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf

or a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting and whenever these elements are present the clause will be applicable.

Further the definition of abduction is in two parts, namely (i) abduction where a person is compelled by force to go from any place and (ii) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of section 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting the right of private defence that arises by reason of such assault extends even up to the causing of death. It would in our opinion be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in one of the sections of the Penal Code quoted above before he takes steps to defend himself even to the extent of causing death of the person abducting. The framers of the Code knew that abduction by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of section 100 the word abducting has been used without any further qualification to the effect that the abducting must be of the kind mentioned in section 364 onwards. We are therefore of opinion that the view taken in *Ram Sarya's case* (1) is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore when the appellant's sister was being abducted even though by her husband and there was an assault on her and she was being compelled by force to go away from her father's place the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

The next question is whether the appellant was within the restrictions prescribed by section 99. It was urged

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that the right of private defence never extends to the inflicting of more harm than what is necessary for the purpose of defending and that in this case the appellant inflicted more harm than was necessary. We are of opinion that this is not so. The appellant gave only one blow with a knife which he happened to have in his pocket. It is unfortunate that the blow landed right into the heart and therefore Gopal died. But considering that the appellant had given only one blow with an ordinary knife which if it had been a little this way or that could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. As has been pointed out in *Amjad Khan* v. *The State* (1) these things cannot be weighed in too fine a set of scales or in golden scale.

We therefore allow the appeal and hold that the appellant had the right of private defence of person under the fifth clause of section 100 and did not cause more harm than was necessary and acquit him.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice P. D. Bhargava and Mr. Justice Misra**

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September 8

RAJ KUMAR HAR SHANKER SINGH—(JUDGMENT DEBTOR)

v.

SRIRANJEET SINGH (DECREE HOLDER)

Pattnon Decree—*Adjustment of maintenance allowance—Executor of the Decree—Objection under s. 47 Civil Procedure Code—Reduction of the debt—Uttar Pradesh Zamindari Debt Reduction Act 1952 ss. 2, 4 and 9 and s. 2 cl. 11 scope of—Appeal maintainability of.*

Kishori Lal wife of R. the appellant was the zamindar whose estate was under the Court of Wards in district Gonda. She died in 1946 and B. P. Singh and his transferee R. Singh

* Sitting at Lucknow.

(1) 1952 S. C. R. 567

filed a suit for possession against R the husband the defendant no 2 and the Deputy Commissioner Gonda as the Manager of the Court of Wards On 15th September 1947 there was a compromise between the plaintiffs and the defendant no 2 under which each was entitled to a one third share of the property in suit On 16th April 1948 a final decree for partition was passed

Rs 500 was paid to the husband the defendant no 2 by the Court of Wards by way of maintenance and on 7th September 1948 there was an order by the Court of Wards under which it is admitted that this maintenance allowance which was paid since the date of compromise namely 15th September 1947 will be debited against the share of the defendant no 2 at the time of the release of the share from the Court of Wards If there will be a balance then the amount will be deducted from share of the defendant no 2 the movables—otherwise his share in the movables will be reduced proportionately On 15th September 1951 there was a compromise and it was agreed that the Court of Wards defendant no 1 shall adjust accounts between the parties by 15th October 1951 in such a way that payments made to the defendant no 2 shall be adjusted from his share of the property and if any balance is still found payable from defendant no 2 it shall be regularly paid as the first charge out of the share of the profits of defendant no 2 after the payment of Rs 1000 per month to the defendant no 2 In case the zamindari is abolished the payment to the plaintiff on account of the aforesaid this from defendant no 2 shall be a first charge on the share of the compensation which may be payable to the defendant no 2 and shall be realizable at once by execution of decree against such compensation in the share of the estate of defendant no 2 in suit

When accounts were those it was found that there was an extra sum which had been paid to the defendant no 2 the appellant not a decree for that extra sum was passed in favour of the plaintiff

On 2nd June 1954 R Singh filed an application for execution of about Rs 12 000 before the District Judge praying that the amount be realized from interim compensation money by attachment and a similar application was filed by the other plaintiff The defendant objected that interim compensation was not liable to attachment under s 47 that the decree was in the nature of a debt within the meaning of Act 15 of 1952 and the decree was liable to be reduced

Held that the applicability of the Zamindari Debt Reduction Act cannot be taken under s 47 Civil Procedure Code before the executing court is the objection does not relate to the satisfaction and discharge of the decree and it is only the court which has

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passed the decree that can reduce the debt and the executing court has not been given the right to reduce the amount of the decree

(ii) also as the objection does not relate to s 47 the appeal against the order is also not maintainable

(iii) that the amount which is due on account cannot be called as a debt or as an advance and the transaction does not amount to a debt and U P Zamindars Debt Reduction Act is not applicable at all

(iv) further that even if it be assumed that it was an advance in cash and was a transaction which in substance amounts to a debt yet on account of cl VI of s 2 of the U P Zamindars Debt Reduction Act it would be exempted within the meaning of debt as defined in the U P Zamindars Debt Reduction Act

(v) further that if the above Act does not apply then s 9 of the Act would also not apply because it applies to a decree to which that Act applies the execution application is maintainable and the objection of the defendant is dismissed *Nihal Singh* v *Ganesh Dass Ram Gopal* (1) *Khincha Mal Hari Kishan Dass* v *Khub Ram Mirana Lal* (2) *Narain Das* v *Mt Radha Kuar* (3) *Shah Chaturbhuj* v *Shah Manu Ram* (4) *Bibi Rehana Khatun* v *Iqtidar Uddin Hasan* (5) *Hazra Mal* v *Shib Ram* v *Ish Datt Dikshit* (6) discussed

Execution Second Appeal no 4 of 1954 against a decree of W Broome District Judge of Lucknow dated the 26th October, 1953

The facts appear in the judgment

R N Shukla and *B L Shukla* for appellant

*Nazirudd*in and *M K Seth* for respondent

The judgment of the Court was delivered by—

V D BHARGAVA, J —Execution First Appeals nos 4 of 1954 5 of 1954 and 18 of 1956 along with Civil Revision no 91 of 1958 arise out of the same subject matter and can be disposed of together Therefore they had all been connected

The facts of the case are that there was one Kishori Lal wife of the appellant Raj Kumar Lal Har Shanker who was the Taluqdar of Shahpur Estate district Gonda The estate was under the management of the Court of

(1) 1936 O W N 1158
(2) 1937 A L J 766
(3) A I R 1939 All 47
(4) 1938 O W N 763
(5) A I R 1943 All 184
(6) A I R 1939 ALL 398

Wards She died sometimes near about 1946 and a suit for possession was brought by Bhaiya Bhagwati Prasad Singh respondent in Execution First Appeal no 18 of 1956 and by Ranjit Singh who was transferee of a share from Bhaiya Bhagwati Prasad Singh who is respondent in Appeals nos 4 of 1954 and 5 of 1954 and is opposite party in Civil Revision no 91 of 1958 Among the defendants is as the Deputy Commissioner and the appellant Raj Kumar Lal Har Shanker Singh husband of Kishori Lall

On the 15th of September 1947 a compromise was arrived at between the plaintiffs and the defendant no 2 that is the appellant—the Deputy Commissioner was only a party as being the Manager of the Court of Wards—by which it was agreed that a suit for partition be decreed that plaintiff no 1, that is Bhaiya Bhagwati Prasad Singh was entitled to one third share that plaintiff no 2 that is Ranjit Singh was entitled to one third share and the defendant no 2 that is Raj Kumar Lal Har Shanker Singh was entitled to the balance of the one third share A decree in the above terms of compromise was therefore passed

A final decree for partition was passed on the 16th of April 1948, and during the pendency of the case after the death of Smt Kishori Lal the Court of Wards had been paying a sum of Rs 500 to defendant no 2 that is Raj Kumar Lal Har Shanker Singh as maintenance An application was made to the court that that payment should be stopped On the 7th of September 1948 there had been certain statements made by the counsel for the parties On behalf of Ranjit Singh it was stated that he had no objection to the maintenance allowance in dispute being paid to defendant no 2 that is the present appellant by the Court of Wards This statement was made because on behalf of defendant no 2, that is the appellant, a statement was made by Sri *Raj Narain Shukla* his counsel that his client had no objection if the estate or two-third of the estate was released from the superintendence of the Court of Wards on the plaintiffs paying two third of the debt due from the estate He further stated that his client would have no

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objection if the maintenance allowance that he got since the date of the compromise that is the 15th of September 1947 is debited against his share at the time of the release in other words the amount was to be debited from one third share in the cash and movables of the estate at the time of the release

After the above statement the court passed the following order

> In view of the above statements of parties counsel I withdraw the injunction The maintenance allowance that will be paid by the Court of Wards to the applicant since the date of the compromise viz 15th September 1947 will be debited against the share of the applicant at the time of the release of his share from the Court of Wards If there will be cash balance then the amount will be deducted from his share in it otherwise his share in the movables will be reduced proportionately

There was yet another compromise on the 15th of September 1951 *Inter alia* it provided as follows

> About the money paid to defendant no 2 by the Court of Wards since 15th September 1947 the date of decree it is agreed that the Court of Wards defendant no 1 shall adjust accounts between the parties by the 15th of October 1951 in such a way that from the moneys payable to the parties according to their share i e one third each the payments made to defendant no 2 shall be adjusted and if any balance is still found payable from defendant no 2 it shall be regularly paid as the first charge out of the share of profits of the defendant no 2 after the payment of Rs 500 per month to the defendant no 2 In case the zamindari is abolished the payment to the plaintiff on account of the aforesaid dues from defendant no 2 shall be a first charge on the estate or the compensation which may be payable to defendant no 2 and shall be realizable at once by execution of decree against such compensation or the share of the estate of defendant no 2 in suit

Thereafter when accounts were done it transpired that there was an extra sum which had been paid to the appellant and a decree for that extra sum was passed in favour of Ranjit Singh decree holder respondent and also in favour of Bhaiya Bhagwan Prasad Singh On the 26th of June 1953 first application for execution was put up before the District Judge by Ranjit Singh for about Rs 12 000 and odd to be realized from interim compensation money by attachment There was also another application to the same effect by him Bhaiya Bhagwati Prasad Singh also filed a similar application for execution In all the three objections were taken by the judgment debtor appellant to the effect that interim compensation was not liable to attachment under section 17 that the decree was in the nature of a debt within the meaning of Act XV of 1952 and that the decree was liable to be reduced and therefore the execution application should be dismissed In all the three cases the learned District Judge held that the decretal amount was not a debt and therefore Zamindars Debt Reduction Act (Act XV of 1952) did not apply In any event even if it was a debt it was due to a person where the debt was advanced on his behalf by the Court of Wards and therefore it would not come within the definition of debt as defined under the U P Zamindars Debt Reduction Act Aggrieved by the decision the judgment debtor has come to this Court and has filed Appeals nos 4 of 1954 5 of 1954 and 18 of 1956 An objection was also taken whether the executing court could not under the provisions of the Zamindars Debt Reduction Act and therefore an application was made to the court which passed the decree for amendment That court also refused to reduce the decree and against that order Revision no 91 of 1958 has been filed

Really speaking the objections that had been taken in the applicability of the Zamindars Debt Reduction Act could not be taken under section 47 of the Civil Procedure Code before the executing court That objection would not relate to satisfaction or discharge of a decree Section 4 of the U P Zamindars Debt Reduction Act makes it clear that it is only the court which

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passed the decree which can reduce the debt and the executing court has not been given any right. Thus if the application that had been given by the judgment debtor before the executing court cannot be called a proper application under section 47 and if the decision is not under section 47 it would not give a right of appeal simply because the application was headed under section 47. This was the preliminary ground taken by the decree holder about the maintainability of the three appeals. We entirely agree with the learned counsel for the respondent that no appeal lies.

On merits the question involved in the appeals is the same which is involved in the revision and even in revision we are against the judgment debtor on merits and we think that the decision of the trial court was correct.

These matters had actually come before one of us and since the question involved was an important question of law they had been referred to a Bench.

Learned counsel for the appellant had urged that the amount which was due from the judgment debtor was a debt as defined in the U. P. Zamindars Debt Reduction Act. In section 2 of the Act debt has been defined as follows:

> debt means an advance in cash or in kind and includes any transaction which is in substance a debt but does not include an advance as aforesaid made on or after the first day of July 1952 or a debt due to—
>
> (i) the Central Government or Government of any State;
>
> (ii) a local authority;
>
> (iii) a scheduled bank;
>
> (iv) a co-operative society; and
>
> (v) a waqf, trust or endowment for a charitable or religious purpose only;
>
> (vi) a person, where the debt was advanced on his behalf by the Court of wards to a ward

The word loan has been defined in very much similar language in the U P Agriculturists Relief Act which is as follows

> Loan means an advance to an agriculturist whether of money or in kind and shall include any transaction which is in substance a loan but shall not include

In the similar language the word loan has been defined in section 2 (9) of the U P Debt Redemption Act which is as follows

> Loan means an advance in cash or kind made before the first day of June 1940 and includes any transactions which in substance amounts to such advance but does not include an advance

In cases arising out of the U P Agriculturists Relief Act and U P Debt Redemption Act this Court has held that the unpaid price of goods does not amount to a loan See *Nihal Singh* v *Ganesh Das Ram Gopal* (1) *Khincha Mal Hari Kishan Dass* v *Khub Ram Munna Lal* (2) and *Narain Das* v *Mt Radha Kuar* (3) A decree for malicious prosecution has been held to be not based on loan See *Shah Chaturbhuj* v *Shah Maujl Ram* (4) Dower debt has been held not to be a loan in the case of *Bibi Rehma Khatun* v *Iqtidar Uddin Hasan* (5)

In the case of *Hajee Mohd Shibh Khan* v *Ish Datt Dikshit* (6) a share of motor lorry was sold and in order to pay the price there was executed a mortgage deed of the share of the sold lorry and some plots of land It was held by MULLA J that the transaction between the parties was not an advance in cash or in kind

We are of opinion that actually there was no advance given to the judgment debtor It was really a case of accounting On the date when the compromise was entered into it was not known whether the judgment-debtor had taken more amount than his own share

(1) 1936 O W N 1158
(2) 1937 A L J 766
(3) A I R 1939 All 47
(4) 1938 O W N 763
(5) A I R 1943 All 184
(6) A I R 1929 All 398

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If there were two partners and each one of them had taken advances from the partnership firm and one may have taken more than the other then one who had taken more would be liable to refund the money but it would not be a loan. Similarly here both the decree holders and the judgment debtors were partners in the property each being entitled to one third share. Certain amounts were paid to one of the co sharers which was actually in excess to his share and therefore that co sharer would be liable to refund the excess amount paid but not is a debt or as an advance.

We might take the analogy of a advances made to a contractor who from time to time demands money for the work done by him. During the course of the contract certain amounts are paid at times but ultimately if it is found that extra had been paid than the amount of work done then in that case the amount so advanced would not be a kind of debt or a loan but would be an amount due on accounting. The amount which is due on accounting is clearly distinct from a debt. In a debt when advance either in cash or in kind is made both the debtor and the creditor know that the advance is being made as a debt but where at the time of the advance neither the creditor nor the debtor knows whether it has been paid in excess of the share to our mind it cannot be called an advance as a debt.

Learned counsel for the appellants had relied on the case of *Sheo Balak v. Sarabjit Singh* (1). In this case the Full Bench has held that—

> If an existing pecuniary liability is substituted by a fresh liability secured by a mortgage or a promote the claim under the mortgage or the promote must be held to be loan irrespective of the manner in which the original liability arose. Thus where some of the co sharers appropriate money due to another co sharer and in satisfaction of that liability execute a mortgage deed in favour of that other co sharer the transaction evidenced by the mortgage deed amounts to a loan within the meaning of the

(1) A. I. R. 1952 All. 516

term as defined in the Agriculturists Relief Act and the Debt Redemption Act.

On the basis of the above observation the learned counsel for the appellant argued that when there was a compromise that this amount would be debited against the share of the judgment debtor they agreed to treat it as a loan. With respect we are unable to agree with this contention. It was after the filing of the suit that this compromise came into existence and therefore anything which had happened in the suit itself will not convert the nature of the original transaction. Actually in this case even on the date of the compromise it was not known whether the money would be due to the decree holders or not. Under the circumstances how can it be said that the parties on that date agreed to treat it as a debt.

In case the amount was ascertained before the filing of the suit and the parties had executed a mortgage or promissory note the position might have been different and it might have been urged that though initially it was not a debt but by execution of the mortgage deed or a promissory note they treated it as a debt.

We are therefore clearly of opinion that the decision of the courts below in different cases that the transaction does not amount to a debt is correct and if the transaction is not a debt the U. P. Zamindars Debt Redemption Act will not be applicable at all.

Even if we were to hold that it amounted to a debt we are of opinion that it would not be a debt within the definition of the word as defined in the U. P. Zamindars Debt Redemption Act. By sub section (2) (j) read with clause (ii) a debt to a person where the debt was advanced on his behalf by the Court of Wards to a ward would not be a debt. There can be no manner of doubt that this payment had been made by the Court of Wards to the judgment debtor who was a ward at that time. If it was a debt at all it was made on behalf of the decree holders. Therefore within this exception the case clearly falls and even if we were to assume that it was an advance in cash and was a transaction which in

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substance amounts to debt yet on account of clause (11) it would be exempted within the meaning of debt as defined in the U P Zamindari Debt Reduction Act

If the above Act does not apply then section 9 would also not apply because it applies to a decree to which that Act applies Moreover, in the present case there had been a definite agreement between the parties that in case the zamindari is abolished this amount would be realizable from the compensation money In the circumstances the decree holders are entitled to realize the amount from the compensation money and their execution application should proceed We therefore see no force either in the appeals or in the revision All of them are dismissed with costs

Since the decree is an old one and since these matters have been pending here for some time the record of the case shall be sent back forthwith to the court below so that the execution of the decree may be made at an early date

Appeals and Revision dismissed

SUPREME COURT

APPELLATE CRIMINAL

Before Mr Justice Imam, Mr Justice Kapur Mr Justice Sarkar and Mr Justice Wanchoo

1959

September 14

CHHADAMI LAL JAIN AND OTHERS

v

STATE OF UTTAR PRADESH AND ANOTHER

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Offences not exclusively triable by the Court of Session—*Proceedings before the Magistrate—Subsequent decision to commit to Sessions—Procedure to be followed—Effect of non-compliance—Code of Criminal Procedure* 1898 *ss* 206 211 212 213 347 (1) *and* 537

If a case not exclusively triable by the Court of Session proceeds as a warrant or summons case and the Magistrate at a later stage decides to commit the accused to Sessions it becomes obligatory to proceed under s 347 (1) of the Code of Criminal Procedure and for that reason to follow the procedure laid down

under ss 208–213 of the Code not of course *de novo* but only in so far as not covered by the earlier proceedings

Accordingly if the Magistrate after the statement of the complainant under s 200 of the Code issues summons to the accused for a charge under s 406 Indian Penal Code—offences alleged in the complaint being in this connection immaterial—examines the prosecution witnesses records the statement of the accused hears arguments and then frames a charge and commits the accused to the Court of Session without complying with the provisions of s 208 of the Code informing or enabling the accused if he so likes to avail of his right to give evidence in defence—the possibility of his choice not to lead such evidence being for this purpose irrelevant the committal is bad in law

The breach of s 208 is of itself sufficient to cause prejudice to the accused and failure of justice and there is no question of the application of s 537 of the Code in such circumstances The commitment must therefore be quashed on this ground alone

Quære whether the same consequences must essentially follow in a mere breach of ss 211 212 and 213 of the Code

Pulukuri Kotayya v *King Emperor* (1) applied

Criminal Appeal No 148 of 1957, from an order of the Allahabad High Court dated 8th May 1957 in Criminal Reference No 149 of 1956

The facts appear in the judgment

G S Pathak Senior Advocate (*Mohan Behari Lal* Advocate with him) for the appellants

G C Mathur and *C P Lal*, Advocates for *G N Dikshit* Advocate for respondent no 1

Janardan Sharma, Advocate for the respondent no 2

The following judgment of the Court was delivered by—

WANCHOO J —This is an appeal on a certificate granted by the Allahabad High Court in a criminal matter The facts of the case may be set out in some detail to bring out the point raised in this appeal A complaint was filed by Rajendra Kumar Jain against the four appellants and three others under sections 409 465 467 471 and 477 A of the Indian Penal Code It is not necessary for present purposes to set out the details of the complaint Suffice it to say that after the statement

(1) (1946) L R 74 I A 65

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of the complainant under section 200 of the Code of Criminal Procedure (hereinafter referred to as the Code) summonses were issued to the accused persons requiring them to answer a charge under section 406 of the Penal Code. Prosecution witnesses were then examined and cross examined and the statements of the accused persons recorded. The Magistrate then heard arguments on the question of framing of charges which were concluded on 23rd September 1954. It was then ordered that the case should be put up on 30th September 1954 for orders. On that date the Magistrate framed charges against the four appellants under sections 409 and 467 read with section 471 and 477 A of the Penal Code. On the same date the Magistrate ordered commitment of the four appellants to the Court of Session on these charges. The remaining three accused were discharged.

There was then a revision petition by Rajendra Kumar Jain against the discharge of one of the three accused namely Bhajan Lal. When the matter came up before the First Additional Sessions Judge, Agra he ordered *suo motu* on 9th April 1955 after a perusal of the commitment order that Bhajan Lal be committed to the Court of Session to stand his trial. In revising this order he dismissed the revision petition as infructuous. Thereupon Bhajan Lal went in revision to the High Court. That petition was heard by Roy J. and he set aside the order of commitment of Bhajan Lal and one of the reasons given by him for doing so was that a Magistrate was not empowered to frame a charge and make an order of commitment until he had taken all such evidence as the accused might produce before him. As Bhajan Lal had not been called upon to produce evidence in defence the order of commitment made by the Sessions Judge was held to be not in accordance with law. This order was passed on 6th October 1955. Thereupon on 7th January 1956 the four appellants filed a revision petition before the Sessions Judge praying that the order of commitment passed against them be quashed and the main reason advanced in support of this petition was that the learned Magistrate had not observed the mandatory provisions of law laid down in sections 208 to 213

of the Code which were essential for a valid commitment This petition came up before the same First Additional Sessions Judge and he made a reference to the High Court that as the procedure followed by the Magistrate was irregular the order of commitment dated 30th September 1954 was bad in law, and should be quashed

This reference came up for hearing before another learned Judge of the High Court namely CHOWDHRY, J and he took the view that the Magistrate had not failed to comply with the provisions of section 208 and that non compliance with the provisions of sections 211 and 212 was curable under section 537 of the Code He therefore rejected the reference There was then an application for a certificate to appeal to this Court which was allowed particularly as the view taken by CHOWDHRY, J was in conflict with the view taken by ROY, J, already referred to

The main contention of the appellants before us is that as the case began before the Magistrate as a warrant case under section 406 of the Penal Code it was incumbent upon the Magistrate, when he decided in view of the provisions of section 347 (1) of the Code, that the case should be committed to the Court of Session to follow the procedure provided in Chapter XVIII of the Code and inasmuch as he had failed to comply with sections 208 to 212 of the Code the commitment was bad in law and should be quashed

The first question that falls for consideration therefore is whether the Magistrate when he began this case was proceeding in the manner provided for the trial of warrant cases Section 347 (1) of the Code comes into play when at any stage of the proceedings in any trial before a Magistrate it appears to him that the case ought to be tried by the Court of Session he has then to commit the accused under the provisions hereinbefore contained The Sessions Judge who made the reference held that the case before the Magistrate proceeded from the beginning as if it was a trial of a warrant case It was on that basis that the Sessions Judge held that when the Magistrate made up his mind that the case ought to be committed to the Court of Session in view of the

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provisions of section 347 (1) of the Code it was his duty to observe the procedure laid down in Chapter XVIII particularly, under sections 208 211 and 212 of the Code The order of reference was sent to the Magistrate for explanation if any, and the Magistrate replied that he had no explanation to submit He did not say in his explanation that he was not proceeding as in a warrant case and that the proceedings before him throughout were proceedings in the nature of an inquiry under Chapter XVIII When however the matter came up before the High Court CHOWDHRY, J was of opinion that though the Magistrate was competent to try the case as summonses had been issued under section 406 Indian Penal Code only it was open to him to hold an inquiry under Chapter XVIII from the very beginning in view of the provisions of section 207 which empower a Magistrate to follow the procedure provided in Chapter XVIII in cases exclusively triable by a Court of Session and also in cases which are not exclusively triable by the Court of Session but which in the opinion of the Magistrate ought to be tried by such court The High Court was further of the view that the offence mentioned in the summons should be deemed to have given notice to the accused that it was optional with the Magistrate to hold an inquiry with a view to commit them to the Court of Session or to try them himself as in a warrant case because column 8 of Schedule II of the Code says that a case under section 406 is triable by a Court of Session Presidency Magistrate or Magistrate of the first or second class Therefore according to the High Court the matter was at large whether the Magistrate was going to adopt one procedure or the other despite the issue of summonses under section 406 of the Penal Code and that nothing had happened to induce the belief in the accused that they would be tried as in a warrant case The High Court, therefore held that the case was proceeded with from the beginning as if it was an inquiry under the Chapter XVIII and on that view it held that there was no non compliance with section 208 of the Code As for non compliance with sections 211 and 218 the High Court was of the view that it was curable under section 537 of the Code as no prejudice was caused

We must say with respect that this view of the nature of the proceedings before the Magistrate is not correct It is true that it is open to a Magistrate to hold an inquiry from the beginning under Chapter XVIII in a case not exclusively triable by the Court of Session But the mere fact that the Magistrate has such power does not necessarily indicate to the accused that he is holding an inquiry under Chapter XVIII rather than a trial before himself Where the case is not exclusively triable by the Court of Session the accused would naturally conclude that the proceedings before the Magistrate are in the nature of trial and not an inquiry under Chapter XVIII If the Magistrate intends to use his powers under section 207 and hold an inquiry from the beginning in a case not exclusively triable by the Court of Session the only way in which the accused can know that he is holding an inquiry and not a trial is by the Magistrate informing the accused that he is holding an inquiry under Chapter XVIII and not a trial If he fails to do so the accused can reasonably conclude that a trial is being held In this case undoubtedly the Magistrate did not indicate to the accused from the beginning that his proceedings were in the nature of an inquiry under Chapter XVIII Therefore the accused would naturally conclude that the proceedings before him were in the nature of a trial of a warrant case as the summonses that they had received were under section 406 of the Penal Code only The fact that in the complaint section 467, which is exclusively triable by a Court of Session, was mentioned is of no consequence for the summonses to the accused were only for a trial under section 406 of the Penal Code It must therefore be held that the proceedings before the Magistrate began as in the trial of a warrant case and if the Magistrate at a subsequent stage of the proceedings was of the view that the case should be committed to the Court of Session he would have to act under section 347 (1) of the Code We have been at pains to refer to this aspect of the matter for considerations would be different if the case was exclusively triable by the Court of Session and began from the outset as an inquiry under

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Chapter XVIII What we shall say hereafter must therefore, be taken to apply only to a case which begin as a proceeding in a warrant or summons case and in which the Magistrate at a later stage takes action under section 347 (1)

This brings us to a consideration of the duty of the Magistrate who takes action under section 347 (1) of the Code That section reads as follows

> If in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court and if he is empowered to commit for trial he shall commit the accused under the provisions hereinbefore contained

The first question that has to be decided is the meaning of the words under the provisions hereinbefore contained These words have been the subject of decision by a number of High Courts and the High Courts are unanimous that they mean that if the Magistrate decides at some stage of the trial to commit the accused he has to follow the provisions contained in Chapter XVIII It is not necessary to refer to those decisions for the words themselves are quite clear They lay down that if the Magistrate comes to the conclusion that the accused ought to be committed for trial he shall commit in accordance with the provisions contained in the earlier part of the Code namely in Chapter XVIII This of course does not mean that the Magistrate must begin over again from the beginning All that he has to do when he decides that the case ought to be committed is to inform the accused and see that the provisions of Chapter XVIII are complied with so far as they have not been complied with up to the stage at which he decides that there might to be a commitment Now the procedure under Chapter XVIII is laid down in sections 208 to 213 of the Code The Magistrate begins by hearing the complainant if any, and takes all evidence that may be produced in support of the prosecution or on behalf of the accused or as the Magistrate

may call himself The Magistrate is also required to issue process to compel the attendance of any witness or the production of any document or other thing if the complainant or officer conducting the prosecution or the accused applies to him After the evidence under section 208 has been taken the Magistrate then examines the accused for the purpose of enabling him to explain any circumstances appearing in evidence against him under section 209 Thereafter if he is of opinion that there are not sufficient grounds for committing the accused for trial he can discharge him unless it appears to him that such person should be tried before himself or some other Magistrate in which case he has to proceed accordingly On the other hand, if the Magistrate is of opinion after taking the evidence and examining the accused that there are sufficient grounds for committing the accused for trial, he has to frame a charge under section 210 declaring with what offence the accused is charged The charge is then read over and explained to the accused and a copy thereof if he so requires, is furnished to him free of cost After the charge is framed the Magistrate calls upon the accused under section 211 to furnish a list of persons orally or in writing whom he wishes to be summoned to give evidence on his trial The Magistrate may also allow the accused to furnish a further list at a later stage in his discretion Section 212 gives power to the Magistrate in his discretion to summon and examine any witness named in any list under section 211 Then comes section 213 which lays down that if the accused has refused to give a list as required by section 211 or if he has given one and the witnesses, if any, included therein whom the Magistrate desires to examine, have been summoned and examined under section 212 the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session and shall also briefly record the reasons for such commitment On the other hand, if he is satisfied after hearing the witnesses for the defence that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused

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It will be seen from this analysis of the provisions relating to commitment that section 208 gives a right to the accused to produce evidence in defence before the Magistrate examines him under section 209 and proceeds to frame a charge under section 210 Now when a Magistrate makes up his mind to commit a case not exclusively triable by the Court of Session under the power given to him under section 347 (1) of the Code he has to follow this procedure But as we have said earlier it is not necessary that the Magistrate should begin from the beginning again when he so makes up his mind The Magistrate may make up his mind at any stage of the trial before him and generally speaking four contingencies may arise Firstly, he may make up his mind after the trial is practically over and the witnesses for the prosecution have been examined and cross examined after the charge, the accused has been examined both under sections 255 and 342 of the Code and all the defence evidence has been taken In such a case sections 208 209 and 210 have been complied with and all that the Magistrate has to do is to intimate to the accused that he intends to commit him for trial and ask him to give the list of witnesses under section 211 and proceed thereafter as provided in Chapter XVIII Secondly the Magistrate may make up his mind after all the witnesses for the prosecution have been examined and cross examined and the charge has been framed but no defence has been taken In such a case that part of section 208 which lays down that all the evidence for the prosecution shall be taken has been complied with and the Magistrate may then proceed to comply with the rest of section 208 and take the defence evidence and then proceed further under sections 209 to 213 and amend the charge so as to make it conformable to a charge in an inquiry under Chapter XVIII or cancel it Thirdly the Magistrate may make up his mind after some of the prosecution witnesses have been examined and cross examined and a charge has been framed In such a case he has to examine the rest of the prosecution witnesses under section 208 and take the defence evidence, if any, produced by the accused and then proceed under sections 209 to

213 amending or cancelling the charge already framed as indicated earlier Lastly the Magistrate may have only just begun taking evidence for the prosecution and may not have framed a charge In such a case he takes the rest of the prosecution evidence and complies with the provisions from sections 208 to 213 But in each of these four contingencies it is the duty of the Magistrate to intimate to the accused that he has made up his mind to commit in view of the provisions of section 347 (1) and then proceed in the manner indicated above It is necessary that the accused should know when the Magistrate makes up his mind to commit so that their right under section 208 to produce defence if any before commitment is made is safeguarded

Now what happened in this case was this The Magistrate had apparently taken all the prosecution evidence and the prosecution witnesses had been examined and cross examined the Magistrate had framed no charges up to 30th September, 1954 He had heard arguments on the question whether any charges should be framed and had fixed 30th September 1954, for orders in this respect When therefore he decided on 30th September, 1954, that the case ought to be committed to the Court of Session, the proper course for him was to refrain from framing any charges and intimate to the accused that he intended to commit them for trial He then should have called upon them to produce defence evidence if any, under section 208 and then proceeded further under Chapter XVIII The Magistrate, however, failed to inform the accused that he had made up his mind to proceed under section 347 (1) and to commit them for trial What he did on 30th September, 1954, was to frame charges forthwith and record an order committing the accused to the Court of Session under section 213 of the Code He thus deprived them of their right to lead defence evidence, if any, under section 208 It may be that if he had told them that he was going to proceed under section 347 (1) and commit them for trial and asked them if there was any defence evidence to be produced, they might have said that they did not wish to produce any

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defence before him at that stage But what the accused would have said if the Magistrate had proceeded in this manner is irrelevant in considering the question whether the commitment in this case was bad in law inasmuch as it did not comply with section 208 so far as giving the accused an opportunity to lead defence evidence if any was concerned The fact remains therefore that in this case the Magistrate when he decided to act under section 347 (1) did not intimate that decision to the accused and proceeded forthwith to commit them for trial under section 213, thus depriving them of the right to produce defence evidence, if any under section 208

The next question which falls for consideration is the effect of this non compliance with section 208 of the Code and whether it is curable under section 537 of the Code The effect of non compliance with various provisions of the Code and whether such non compliance is curable under section 537 have been the subject of a large number of cases before various High Courts and also before then Lordships of the Judicial Committee of the Privy Council It is not necessary to refer to this mass of authorities One of the earliest of these cases decided by the Privy Council is *Subramania Iyer v King Emperor* (1), while one of the latest is *Pulukuri Kotayya v King Emperor* (2) The law was summed up by their Lordships of the Judicial Committee in *Pulukuri Kotayya s case* (2) at p 75 in these words

> When a trial is conducted in a manner different from that prescribed by the Code (as in *N A Subramania Iyer s case* (1), the trial is bad, and no question of curing an irregularity arises but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct the irregularity can be cured under section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather

(1) (1901) L R 28 I A 257 (2) (1946) L R 74 I A 65

than of kind This view finds support in the decisi on the their Lordships Board in *Abdul Rahman* v *King Emperor* (1) where failure to comply with section 360 of the Code of Criminal Procedure was held to be cured by sections 535 and 537

These observations were quoted with approval by this Court in *Narain Rao* v *The State of Andhra Pradesh* (2) It seems, therefore fruitless to consider whether the non compliance with section 208 in this case is an illegality which cannot be cured under section 537 or an irregularity which is curable thereunder As the stage of trial has not been reached in this case no question arises of considering whether the trial has been conducted in a manner different from that prescribed by the Code What we have to see is whether the breach of section 208 which has occurred in this case is such that the Court will presume prejudice to the accused by the mere fact of the breach If such presumption can be made the breach would obviously be not c nable under section 537 of the Code, even assuming that that section applies The question therefore, which eventually emerges is whether this breach of section 208 is of such a character that the Court will presume that there has been prejudice to the accused by the mere fact of the breach Now the accused has a right under section 208 to produce evidence in defence, if any before the Magistrate proceeds to decide whether a charge should be framed or not The Magistrate s decision whether the charge should be framed or not is bound to be affected one way or the other if evidence is produced by the accused, for the Magistrate would then be bound to consider the effect of that evidence on the question of framing the charge

If the accused is denied the opportunity of leading that evidence which he has a right to do under section 208 it seems to us that the denial of such right is sufficient to cause prejudice to the accused and section 537 would have no application to a case of this kind The possibility that the accused may not

(1) (1926) L R 54 I A 96 (2) 1958 S C R 283

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have produced defence if asked by the Magistrate whether he would do so is of no consequence so far as this conclusion is concerned If this is the reply expected it makes it all the more incumbent on the Magistrate to inform the accused that he was intending to commit the case and ask him if he wished to produce evidence If the accused did not want to do so, the Magistrate would have done his duty and his way would be clear to proceed further with his intention to commit the accused But when the Magistrate did not intimate to the appellants in this case that he was intending to commit them for trial and proceeded to frame charges and pass the order of commitment forthwith on 30th September he was denying to them their right to produce defence under section 208 of the Code The denial of that right is in our opinion in itself sufficient to cause prejudice to the accused and failure of justice inasmuch as the accused were prevented from leading evidence which might have induced the Magistrate not to frame a charge against them or cancel it We are therefore, of opinion that the breach of section 208 which took place in this case was such as was bound to cause a failure of justice and there is therefore, no question of the application of section 537 in these circumstances The commitment is, therefore, bad in law and must be quashed on this ground alone

In the petition of appeal the appellants have referred also to breach of provisions of sections 211, 212 and 213 of the Code As we have come to the conclusion that the breach of section 208 in this case is sufficient to invalidate the commitment it is not necessary to consider the effect of the further breach of sections 211, 212 and 213 What we have said in this case with respect to the effect of the breach of section 208 may not be taken as applying to the breach of sections 211 212 and 213 for the considerations arising out of those breaches may be different

We therefore allow the appeal quash the order of commitment as well as the charges framed and send the case back to the Magistrate to proceed in the manner indicated above according to law

Appeal allowed

APPELLATE CIVIL

*Before Mr Justice V D Bhargava**

DIVISIONAL SUPERINTENDENT, NORTHERN RAILWAY MORADABAD (APPELLANT)

v

UMRAO (RESPONDENT)

1959 September 23

Workman—*Duty—Leave—Course of employment—Accident—Notice, if essential—Course of employment meaning of—Compensation—Workmen's Compensation Act 1923 ss 10 and 3(1) scope of*

Umrao the respondent was a gateman at the Railway Crossing gate no 218 near Jalalpur On September 4 1953 when he was at his quarters he was attacked by the dacoits who came there to loot the wagons and he sustained injuries on the left hand and right eye He claimed compensation under the Workmen's Compensation Act claiming that he got the injuries in the course of his employment and arising out of it The defence was that the respondent was on sick leave on that day and was not in the course of employment and also no notice as required under s 10 of Act was given within a reasonable time

The Workmen's Compensation Commissioner found that Umrao received injuries in his eyes in an encounter with persons who wanted him to violate the instruction of the Railway authorities Umrao though on sick leave was in the Railway quarters in the capacity of a workman and sustained injuries as such Rs 1 008 was awarded as compensation to Umrao the respondent The Railway has come in appeal

Held, that although s 10 of the Workmen's Compensation Act is mandatory with regard to the notice of the accident to be given in the manner provided under the Act but the effect of this mandatory provision is greatly taken away by subsequent proviso to that very section which provides that the want of any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if the employer or any one of several employers or any person responsible to the employer for the management of any branch or the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred and the want of notice in the present case is not fatal to the claim

*Sitting at Lucknow

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Held also that the Commissioner may entertain and decide any claim to compensation if he is satisfied that the failure so to give the notice or prefer the claim was due to sufficient cause

Held that if a person is on leave he is not supposed to do any work and could not, therefore be on duty and as the accident did not take place during the course of the employment of the respondent he is not entitled to lay any claim against the railway

K C Nath v Salima Khatoon (1) *National Iron and Steel Co, Ltd v Mano ama Dasi* (2) considered

First Appeal From Order No 44 of 1955 against an order of B B Lal Commissioner Workmen s Compensation Act dated 22nd August, 1955

The facts appear in the judgment

B N Mulla for the appellant

K C Goel for the respondent

V D BHARGAVA, J —This is an appeal under section 30 of the Workmen s Compensation Act (Act VIII of 1923) by the Divisional Superintendent, Northern Railway Moradabad against the order of the Commissioner Workmen s Compensation Act, Lucknow, awarding a compensation of Rs 1,008 in favour of Umrao against the appellant

The facts of the case are that Umrao respondent was employed in the Northern Railway as a Gateman at the Railway Crossing gate no 218 near Jalalpur On 4th September, 1953 in the night when he was at his quarters he along with others was attacked by the dacoits, who had come to loot the wagons and he sustained injuries on the left hand and right eye He therefore, claimed that he got these injuries in the course of his employment and arising out of it and therefore, he was entitled to compensation under the Workmen s Compensation Act

The defence *inter alia* of the appellant was that he had no information about this occurrence, that the respondent was on sick leave on that day and was not in the course of employment on that day and also that no notice as required under section 10, of the accident had been given within a reasonable time

(1) A I R 1938 Rang 439 (2) A I R 1953 Cal 143

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The Commissioner framed the following four issues

(1) Was there any occurrence of dacoity in the Railway Quarter?

(2) Whether it was obligatory on the part of the workman to live in the Railway Quarter?

(3) Did he sustain injuries in protecting Railway property?

(4) Is the claim for compensation preferred within time

If so, to what amount of compensation the workman is entitled?

The finding of the Workmen's Compensation Commissioner is that Umrao received injuries in his eyes in an encounter with persons who wanted him and other gatemen to violate the instructions of the Railway authorities Umrao though on sick leave, was in the Railway quarters in the capacity of a workman and sustained injuries as such He further held that the claim was not barred by time and, therefore, he awarded Rs 1,008 as compensation to the respondent

Aggrieved by that decision of the court below the Divisional Superintendent, Northern Railway, Moradabad, has come up in appeal

Learned counsel for the appellant had first urged, that though an objection had been taken in the written statement about the validity of the claim on the ground of want of notice yet no issue was framed on that point It was contended by the learned counsel for the appellant that the words of section 10 of the Workmen's Compensation Act are mandatory when they say that no claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof According to the counsel for the appellant if no notice is given within a reasonable time, the claim of a workman should be thrown out *in limine* on that ground alone

On behalf of the respondent it has been urged that though the words used in the opening portion of section

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10 are so, but their effect has been greatly taken away by the subsequent proviso to that very section. The second proviso is to the following effect:

> Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim—
>
> (a)
>
> (b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred.

It was argued on behalf of the respondent that by means of Ex. P 1 the P. W. Inspector had informed the appellant at least on 9th February, 1954, that an accident of this nature had taken place and the respondent while he was on sick leave had received injuries in his hand and right eye while helping Ram Nath and Natha who were assaulted by thieves on 4th September, 1953, while on duty. It was further contended that in this particular letter there was reference to two other previous letters by the same officer to the appellant, which were, dated 18th September 1953 and 5th October, 1953. By an application the respondent had asked for the production of these documents, but they were withheld by the appellant and, therefore, it was argued that a presumption should be drawn against the appellant to the effect that the letters contained an intimation of this incident, and if the letter, dated 18th September, 1953, had any reference of this accident then the respondent was protected by the second proviso to section 10 of the Act. In my opinion, I do not think that want of notice in the present case is fatal to the claim.

Apart from this provision, there is another provision in the same section, which further provides that the Commissioner may entertain and decide any claim to compensation in any case, notwithstanding that the notice

has not been given, or the claim has not been preferred in due time as provided in this sub section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause In any event, if the Commissioner has entertained the claim in the present case I do not think that I sitting as an appellate court would be justified in reversing its decision on that ground

It was further contended by the learned counsel for the respondent that as a matter of fact this point was not pressed at all otherwise he would have got an issue framed in the court below In any event as I have said earlier this want of notice under section 10 is not fatal to the claim it is no use pursuing this matter further

The next ground urged by the learned counsel for the appellant is that the injury which the respondent sustained did not *arise out of and during the course of employment* , and they are the first ingredients on which any employer can be made liable Reliance was placed on the words of section 3 (1) of the Act which reads as follows

> If personal injury is caused to a workman by accident *arising out of and in the course of his employment*, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter

The sole question for consideration, therefore is whether this injury arose out of and in the course of the respondent s employment Admittedly the employee was on sick leave on the date of the accident and he was not expected to do any work on behalf of the employer so long as he was on such leave It was therefore contended, that he cannot be held to be in the course of employment and secondly if he was not in the course of his employment, then the accident did not arise out of the employment

Learned counsel for the respondent relied on a Full Bench decision of this Court reported in *Works*

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Manager, Carriage and Wagon Shop E I Rly v. *Mahabir* (1) where it was observed as follows

> The word employment is of wider import than the word work or duty The expression in the course of employment means not only the actual work which the man is employed to do but what is incident to it in the course of his service The expression is not to be regarded as confined to the nature of the employment It applies to employment as such i e to its nature its conditions its obligations and its incidents It would thus include not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be but for his employment

The counsel for the respondent had laid great stress on the words nature conditions and obligations of the employment and also on the words when he is at a place where he would not be but for his employment According to him the Rules of the Railway Administration direct that all gatemen shall be in their quarters at the gate and therefore the respondent was at that place owing to one of the conditions of his employment and as such he should be deemed to be in the course of his employment The facts of this case were entirely different from the facts of the present case and do not help the respondent in this case That was a case where the accident had happened in the railway yard while the employee was going to his duty and the question was whether he would be deemed to be in the course of his employment So far as the periods when an employee leaves his house for the place of his employment and also the time when he leaves it for his residence are concerned it has been held in numerous cases that time and place will be deemed to be during the course of his employment It would be saying entirely a different thing altogether that if gatemen are supposed to live in their quarters they should be deemed to be all the twenty four hours in the course of employment , and

(1) A I R 1954 All 132

if anything happened at any time during this period the employer would be responsible When a person is on leave he is not at all in the course of his employment He is not supposed to do any work for the employer and, therefore, by no stretch of the words in the course of employment it could be said that such a case would be covered by section 3 of the Act The first ingredient that is necessary in order to establish that the employee was in the course of employment was that the person injured must have been on duty at that time and must be supposed to do some work Whether he is doing that work or not, or he is doing some other work is immaterial but if he is supposed to do some work then he would be deemed to be in course of the employment A gateman when he is on duty, whether any train is passing at that time or not would be supposed to be on duty He may at that time be doing nothing or relaxing yet he would be in the course of employment On the other hand, if a person is not on duty and he takes upon himself to do something which he thinks ought to be done for his employer, he will not be deemed to be in the course of his employment It is not the work which is being done that determines whether a person is in the course of employment or not It is only, whether he is expected to do anything during the period or not It is immaterial whether he is doing any particular work or sitting idle, but he must remain there Thus as I have said that if a person is on leave he is not supposed to do any work, and would therefore not be on duty

Learned counsel for the respondent further relied on the case reported in *K C Nath* v *Salima Khatoon* (1) In that case an engine driver was employed on a steam launch during the whole round voyage In the course of the voyage a temporary halt was made During that halt an accident took place to the engine driver while doing certain repairs to the engine and the boiler as a result of which he died It was held therein that because during the voyage a temporary halt was made, it could not be said that the engine driver's employment

(1) A I R. 1956 Raj 439

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did not continue during the halt. The accident therefore arose out of and in the course of his employment. The facts of that case are entirely different from the facts of the present case. If that engine driver had taken two days leave and was not expected to do any work in that period and even then doing the same work he would not be deemed to be in the course of employment. At the time of the incident he was not actually working the engine but if the cargo had been loaded earlier he would have had to start earlier and therefore he was to be on the launch and was supposed to be on duty all the time. Under these circumstances, this case does not support the respondent's case.

Another case relied upon by the learned counsel for the respondent is *National Iron and Steel Co., Ltd.* v. *Monorama Dassi* (1). In that case a boy was employed by the appellants in a canteen or tea shop and it was part of his duty to take tea from the tea shop which was outside the factory gates to various persons in the factory. On April 28, 1949, late in the afternoon the boy was returning to the tea shop, after having served tea to certain persons in the factory when he had to pass a mob of workmen who were leaving the factory. This mob was attacking the police and the police had to fire in self defence. Unfortunately a bullet struck this boy and he was severely wounded. He was taken to hospital but unfortunately died the following day. It was held that—

> the accident arose in the course of the employment because the boy had been delivering tea to persons in the factory as it was his duty to do and was returning with a tea tray and tea pot thereon to the canteen or tea shop as he was bound to do. Whilst so returning he received this bullet wound and it is clear that he received it in the course of his employment that is, whilst he was actually doing what he was employed to do.

There cannot be any doubt in the case cited above that during that period the boy was expected to do certain work that is, to carry tea from the canteen to the factory

(1) A. I. R. 1953 Cal. 143

and therefore this case will fall under the category given by me above Under the circumstances I think this case too does not help the respondent in any way

As regards the question whether the accident arose out of the employment or not there may be some doubt but as in my opinion the accident did not take place during the course of the employment of the respondent he is not entitled to lay any claim against the appellant

I accordingly set aside the order of the court below and dismiss the respondent's claim The appeal is allowed but in the circumstances of the case I order the parties to bear their own costs

Appeal allowed

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CIVIL MISCELLANEOUS

*Before Justice Tandon**

RAJA BIJAI PRATAP SINGH (PETITIONER)

v

STATE OF UTTAR PRADESH (RESPONDENTS)

1959

September, 26

Zamindari Abolition—*Rolls finalized—Amendment in the Act, whether retrospective—Amendment of the Rolls, scope of—Adjustment of—Minus assets with the other estate of the intermediary scope of—Uttar Pradesh Zamindari Abolition and Land Reforms Act and Rules, rule 39 B—sub rule (2) applicability of*

Held, that where after the rolls has been finalized the law is amended then unless the law itself provides that it shall have retrospective operation and further any rolls already finalized shall also be amended accordingly it will not authorize the authority concerned to effect any changes much less entitle him to do so on the pretext of removing any mistake or error The proviso added to sub rule 2 of rule 39 B does not give a retrospective operation

Held also that where the net assets of a certain estate happen to turn out on the minus side and as a result of which the intermediary in the ultimate analysis gets no compensation therefrom it will not entitle the State to adjust the minus assets in the assets of other estates belonging to the intermediary

*Sitting at Lucknow

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which too might have been acquired and the alteration made in the Compensation Assessment Roll by the Compensation Officer reducing the amount on the above basis is *ultra vires* and without jurisdiction

Civil Miscellaneous Writ Petition no 103 of 1958

The facts appear in the judgment

Iqbal Ahmad and *Shiva Gopal* for the applicant

The Senior Standing Counsel and *Keshri Bir Prasad* for the respondent

TANDON, J —The petitioner was Taluqdar of Rehwa Estate in the district of Bahraich He owned 58 villages described in Schedule A to this petition By a notification under section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, all his interest in the said villages as Taluqdar was acquired under the said Act and he became entitled to payment of compensation in lieu thereof

Chapter III of the Uttar Pradesh Zamindari Abolition and Land Reforms Act lays down the procedure for determination of compensation payable to intermediaries whose estates have been acquired under the Act Section 39 provides the manner in which gross assets, as respects a mahal, shall be computed and section 40 contains provision for the preparation of draft Compensation Assessment Roll in respect of each intermediary separately Section 42 says how the gross assets of an intermediary shall be arrived at Then comes section 44 which requires net assets of every intermediary to be determined Section 46 says that after the draft Compensation Assessment Roll in respect of any intermediary has been prepared the same shall be published in the manner laid down in it while persons desiring to file objections will also be required to do so within a period of two months The next two sections make provision for the hearing and deciding of objections Under section 49 the order of the Compensation Officer deciding objection is to be deemed to be a decree of a civil court and an appeal therefrom to the District Judge is permitted by section 50

The next two sections 50 A and 51 are not relevant at the present occasion Section 52 provides as under

> 52 (1) Where no objection has been filed in regard to the draft Compensation Assessment Roll in pursuance of the notice under section 46 or where such objections are filed and have been finally disposed of and the draft Compensation Assessment Roll amended altered or modified accordingly, the Compensation Officer shall sign the same and also affix his seal thereto
>
> (2) The Compensation Assessment Roll when so signed and sealed shall become final'

Under section 53 a copy of the Compensation Assessment Roll is to be delivered free of charge to the intermediary concerned by the Compensation Officer The next relevant provision is section 60 which says that the amount of compensation determined under section 54 or 55 as payable to an intermediary shall be declared by the Compensation Officer in respect of his interest in the mahal to which the Compensation Assessment Roll relates and the Compensation Officer shall record it in the roll in his own writing Then comes section 61 which says that, except as provided by or under the Act no correction shall be made in the Compensation Assessment Roll after it has become final Sub section (2) of this section however permits the Compensation Officer at any time before the payment of Compensation to correct any clerical or arithmetical mistakes in the Compensation Assessment Roll or any error arising therein from any accidental slip or omission This he may do *suo motu* or on an application filed by the person interested

In the present case there is no dispute that the Compensation Assessment Roll in respect of 58 villages had been finalized on 27th December 1954 The amount of compensation payable to the petitioner on the basis of the final Compensation Assessment Roll was also determined and entered in the final Compensation Roll

Nearly ten months after the finalization of the Compensation Assessment Roll the same was amended by the

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Compensation Officer by reducing the amount of compensation initially determined by Rs 1,15 144 This decrease was with respect to 12 villages mentioned at serial nos 1 to 12 in the list given in Schedule A The amount of compensation which was determined originally at Rs 3,02 660 13 4 was thus reduced to Rs 1,87 516 13 4 When the petitioner, whose case is that the above change was made without notice to him when he got information about the alteration made in the Compensation Roll he preferred objections It is said that those objections are still pending

One further change was made in the Compensation Assessment Roll on 30th December 1957 This time the change was occasioned by the fact that in the case of certain villages a minus statement was prepared on account of compensation In other words, the net assets of the petitioner were computed in their cases below zero on the minus side What the compensation authorities, therefore, decided was to consolidate the Compensation Assessment Roll of the villages, which had been acquired, and reduce the aggregate net assets of the intermediary by the amount of the minus assets In this way a further decrease in the sum of Rs 47,974 2 4 was effected in the compensation payable to him The amount of the total compensation payable to the petitioner was thus reduced to the figure of Rs 1 46,253 11 The petitioner has challenged the second alteration also made in the Compensation Assessment Roll and holding that they were illegal and without authority of law he filed the present petition asking that the said two orders be quashed

So far as the facts go there is no dispute Nevertheless the respondents are justifying their action in the case of the first deduction on the strength of the proviso which was inserted in rule 39 B sub rule (2) some time in 1955 and in the case of the second on the ground that since all the 58 villages belonging to the petitioner had been acquired by one transaction they were entitled in assessing the final compensation to deduct the minus assets

The provisions of the U P Zamindari Abolition and Land Reforms Act relating to the assessment of compensation have been noticed above The scheme of sections 39 to 44, in accordance with which the net assets of an intermediary are determined, contemplates that in the first place the Compensation Officer shall find out the gross assets of a mahal and having done so he shall proceed to determine the gross assets of each intermediary in the mahal and in the end find out his net assets in the mahal in accordance with section 48 The unit for payment of compensation is thus a mahal and it is in that context that the Compensation Assessment Roll is prepared Section 54 also provides that the amount of compensation payable to an intermediary shall be in respect of his interest in the mahal In other words, every intermediary is entitled to be paid compensation for his interest in a mahal which is to be treated as the unit and basis of the compensation payable to him Section 60 requires that the amount determined under section 54 as compensation payable to an intermediary shall be declared by the Compensation Officer and entered in his own writing in the Compensation Assessment Roll Under section 52 the final Compensation Assessment Roll, which is prepared after all the objections in respect of the Draft Roll published earlier have been disposed off shall be signed and also sealed by the Compensation Officer It further provides that the Compensation Assessment Roll when so signed and sealed shall become final Once the Compensation Assessment Roll has, therefore, been signed and sealed a legal sanctity attaches to it, it becomes final and the amount entered in it on account of the net assets of an intermediary becomes final between the parties, viz the intermediary, on the one hand, and the State, on the other It cannot be altered thereafter except in so far as the law may have permitted it

Under section 60 the amount of compensation payable to the intermediary, which is worked out on the basis of the final Compensation Assessment Roll, has also to be entered in the Roll This again has to be done by the Compensation Officer in his own writing The underlying idea throughout these provisions is that the Com

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pensation Assessment Roll and the entries made there under have a finality about them They are not to be altered, varied or amended except in so far as the law may have permitted It is in accordance with this document that compensation becomes payable and neither party can ask or pay more or less Section 61 of the Act, however, gives power to the Compensation Officer to remove error in it if they are errors arising from any accidental slip or omission or have been due to any arithmetical or clerical mistake As a matter of fact sub-section (1) of this section has been provided in these terms

> Except as provided by or under this Act no correction shall be made in the Compensation Assessment Rool after it has become final

restricted the powers of the Compensation Officer to effect alterations in the Compensation Roll on the ground mentioned in sub section (2) only The law does not permit the Compensation Officer to effect any change in it unless he can attribute them to any error arising from any accidental slip or omission or due to any clerical or arithmetical mistake

In the present case admittedly no such mistake or error existed in the Compensation Assessment Roll which finalized on 27th December, 1954 The amount of compensation which was later entered in it under the hand of the Compensation Officer did not also similarly suffer from any such defect The changes which have been made in it were done because

(1) subsequently in 1955, long after the Compensation Assessment Roll had been finalized rule 59 B

(2) had been amended by the insertio nof a new proviso, and

(3) the aggregate net assets of the intermediary were reduced by deducting there from the amount called as minus assets

It is not possible by any stretch of reasoning to hold for a moment that the deduction becoming necessary on account of a subsequent change in the rules relating to the determination of proportionate agricultural income-tax were due to any accidental slip or omission or any

clerical or arithmetical mistake On the other hand, the statement as it was prepared and finalized in December 1954, was in accordance with the rules then in force There was thus on the respondents own showing no error or mistake in its preparation at the moment it was prepared If later after the Rolls has been finalized the law is amended unless the law itself provides that it shall have retrospective operation and further that any rolls already finalized shall also be amended accordingly it will not authorize the authority concerned to effect any changes much less entitle him to do so on the pretext of removing any mistake or error I have not been able to find anything in the proviso that was added to sub rule (2) of rule 39 B in 1955 to give it retrospective operation As a matter of fact the further question can also be raised viz whether the State Government had power under the law to make a rule with retrospective operation but it is not necessary to deal with this aspect further because as I have said earlier there is nothing in this proviso or elsewhere to show that it was to have retrospective operation That being so the Compensation Officer went clearly wrong in interfering with the Compensation Assessment Roll in 1957 on the strength of the amendment made in 1955 His action was not only contrary to law but wholly without jurisdiction It has no legal effect

Coming to the Second alteration by which the amount was once again reduced by Rs 47 974 2 4 a reference to the relevant provisions of the U P Zamindari Abolition and Land Reforms Act 1950 has already been made above Under its provisions the unit of assessment and for payment of compensation is the interest of an intermediary in a mahal The Scheme of the Zamindari Abolition and Land Reforms Act envisages the acquisition of estates and although all the estates in the State of Uttar Pradesh were acquired by one notification under section 4 of the Act simultaneously and at one time, nevertheless in law each estate was acquired so to say separately for the purpose of determination and payment of compensation Article 31 of the Constitution contemplates that whenever property is acquired by the

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State for a public purpose, as was the case here, compensation shall be payable therefore by the State. If therefore the State acquired so many estates it has to pay compensation for each of them.

It is in this background that the scheme for payment of compensation contained in the Zamindari Abolition and Land Reforms Act shall need to be construed and given effect to. If therefore an intermediary is entitled to a certain amount as compensation in respect of his interest which has been acquired in any mahal the law entitles him to receive that compensation and the State also is bound to pay it. Because the net assets of a certain estates happen to turn out on the minus side and as a result of which he in the ultimate analysis gets no compensation therefor, it will not entitle the State to adjust the minus assets in the assets of other estates belonging to the petitioner which too might have been acquired. If this proposition is accepted, viz. that the Compensation Officer can adjust the minus assets in the assets of the other estates the inevitable result will be that in the case of estates with minus assets not only there will be no acquisition but with the acquisition the State will get some further amount from the person whose property is acquired. This can never be the intention underlying Article 31 of the Constitution or of the provisions contained in the Zamindari Abolition and Land Reforms Act.

Again therefore I shall hold that the alteration made in the Compensation Assessment Roll by the Compensation Officer by which he reduced the amount by Rs. 47,974.2.4 was *ultra vires* and without jurisdiction.

As no other ground has been urged for or against I hold that this petition must succeed. The order of the Compensation Officer dated the 20th October, 1955 and the order dated 30th December, 1957 are quashed. The petitioner will get his costs from the respondents.

Petition allowed.

SUPEREME COURT

APPELLATE CRIMINAL

Before Mr Justice Gajendragadkar and Mr Justice Rao

THE MUNICIPAL BOARD MAINPURI

v

KANHAIYA LAL

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

1959

October 6

Toll—*Power of Municipal Board to levy—Restriction on—United Provinces Municipalities Act 1916 s 128 (vii)*

Subject to any general rules or special orders of the State Government the power of the Municipal Board to levy toll on vehicles etc under s 128 (vii) of the United Provinces Municipalities Act is confined to those entering the Municipality from places outside its local area

The owner of a truck carrying coal from the goods shed which is included within the municipal limits although the rest of the railway station is excluded therefrom is therefore not liable to the payment of toll claimed by the Municipal Board

Criminal Appeal No 88 of 1958 from an order of the Allahabad High Court dated 23rd August 1957 in Criminal Revision No 54 of 1955

The facts appear in the judgment

S P Sinha, Senior Advocate (*B R L Iyengar*, Advocate) with him for the appellant

The respondent was unrepresented

The judgment of the Court was delivered by

SUBBA RAO J —This appeal raises the question of true interpretation of section 128 of the United Provinces Municipalities Act 1916 (hereinafter called the Act) The facts lie in a small compass and they are not in dispute

The State Government issued a notification defining the municipal limits of the town of Mainpuri Under this notification the goods shed of the Mainpuri railway station is included within Mainpuri municipal limits but the rest of the station is excluded therefrom A

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Raja J.

motorable road connects the station with the main inhabited area of the town The Municipality fixed a toll barrier on this road between the railway goods shed and the inhabited area of the town The Mainpuri Electric Supply and General Mills Co Ltd Mainpuri supplies electricity to Mainpuri Town It purchases coal from places outside Mainpuri and receives the same in railway wagons, which are unloaded and kept in the goods shed The respondent owns a truck He was engaged to carry the coal from the goods shed to the premises of the electric company, which is inside the town He loaded his truck with coal at the railway goods shed and was taking the same to the premises of the electric company when he was asked to pay toll tax at the toll barrier but he did not pay it He was prosecuted under section 299 (1) of the Act read with rule 1 of the rules for assessment and collection of toll tax The respondent denied his liability to pay the tax The Sub Divisional Magistrate convicted him under the said section and directed him to pay a fine of Rs 67 8 On appeal the learned Sessions Judge Mainpuri confirmed the same In revision the High Court set aside the conviction and acquitted the accused The Municipality by special leave has preferred this appeal

Learned Counsel for the appellant contends that on a true construction of section 128 of the Act and the Rules framed thereunder the respondent was guilty of the offence with which he was charged As the question raised turns upon the construction of the said provisions, it would be convenient to read the relevant provisions at this stage

> S 128—(1) Subject to any general rules or special orders of the State Government in this behalf the taxes which a board may impose in the whole or any part of a municipality are—
>
> (vii) a toll on vehicles and other conveyances animals and laden coolies entering the municipality

Section 153—The following matters shall be regulated and governed by rules except in so far as provisions therefor is made by this Act, namely—

(a) the assessment, collection or composition of taxes, and, in the case of octroi or toll, the determination of octroi or toll limit

Rules framed by the Municipality, Mainpuri

Rule 1— No person shall bring within the limits of the Mainpuri Municipality

Any laden vehicle or laden animal in respect of which a toll is leviable under notification no 1866/XXIII—97 of 31st January, 192L, until the toll due thereof has been paid to such persons, and at such barriers as the board may from time to time appoint

* * *

Rule 3— When any laden coolie or any person in charge of a laden vehicle, or a laden animal wishes to pass barrier such coolie or person shall pay the toll due to the Moharrir at the barrier

Any breach of these rules amounts to an offence under section 299 (1) of the Act, and is punishable under the penalty clause of the rules which is in these words

"Any breach of the rules 1, 2 3 and 4 above shall be punishable with fine which may extend to Rs 50 but shall in no case be less than ten times the amount due from the offender on account of the tax"

The following ingredients of the offence may be gathered from a combined reading of the said provisions (1) The toll is on vehicles, (2) a person cannot bring a laden vehicle without paying the prescribed toll within the limits of the Municipality from without, (3) the person in charge of such vehicle must pay a toll at the barrier and (4) if he does not pay he is liable to punishment It is clear from the wording of the provisions that they are designed for collecting toll from laden vehicles entering the municipal limits from without

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Rao J.

Subject to any general rules or special orders of the State Government in this behalf—it is not suggested that there are any such—the municipal board's power under section 128 (vii) of the Act to levy toll on conveyances is confined only to those entering the municipality. The word entering in section 128 (vii) of the Act clearly indicates that the conveyance to be liable to the toll must enter the Municipality from places outside it. By no stretch of language it is possible to hold that a vehicle which is already in the limits of the Municipality when it plies for hire enters the municipal limits. So too, the words bring within the limits of Mainpuri Municipality in rule 1 emphasize the idea that a laden vehicle cannot be brought within the Municipality until the toll due has been paid. One cannot bring within the Municipality a vehicle which is already in the Municipality. Confronted with the clear terminology used both in the section as well as in the Rules, the learned counsel for the appellant attempted to argue that the words Mainpuri Municipality are comprehensive enough to take in part or parts of that Municipality and therefore when a laden vehicle passes from one part of the Municipality to another part, it has to pay toll if there is a barrier between the two parts. This argument may perhaps be ingenious, but to our mind it is clearly unsound. We find it well nigh impossible to hold that a vehicle is brought within the limits of the Municipality when it is brought from one part of the Municipality to another part.

In the result we agree with the construction put upon the section by the High Court. The appeal fails and is dismissed.

Appeal dismissed.